ACAS Arbitration: Continuity and Change

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I DECLARE THAT THIS THESIS HAS BEEN COMPOSED BY ME AND THAT THE CONTENT IS ENTIRELY MY OWN WORK

[Alice Brown]

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ABSTRACT

This thesis examines the arbitration function of the Advisory, Conciliation and Arbitration Service [ACAS] as one form of third party intervention in British industrial relations. It provides an explanation for the apparent contradiction between the stance taken by Conservative governments post-1979 to trade union reform on the one hand; and the survival of an agency which maintains many of the attitudes and practices associated with the past on the other. In spite of government rhetoric and changes which have occurred in the period examined, it is argued that the key attitudes and practices in relation to arbitration have not altered significantly over time.

Questionnaire surveys of arbitrators and the parties to arbitration were conducted in conjunction with a study of arbitration awards over the period 1942-1985. These revealed that many of the debates relating to arbitration, including support for voluntarism and resistance to compulsion in the process, the criteria for the appointment of arbitrators with appropriate skills and experience and the factors which arbitrators should consider in making their awards, have their foundation in the early part of this century: that the main focus of criticisms of arbitration surround issues of pay and terms and conditions of employment and that they were unfounded: and that the majority of parties to arbitration were satisfied with the service they received.

The practice of arbitration was located within the corporatist theory debate and it was contended that elements of corporatist and pluralist relationships and networks within ACAS had survived the election of a government openly hostile to both corporatism and quangos. Explanations for the survival of ACAS and the arbitration service as one form of third party intervention can be found within the corporatist and dualist debate and understood within the context of the role which arbitration has played in the history of British industrial relations.

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PART I

CONTEXT

CHAPTER 1

CORPORATIST THEORY AND ARBITRATION PRACTICE

INTRODUCTION

"Every beginning is difficult"

[Karl Marx]

The establishment of the Advisory Conciliation and Arbitration Service [ACAS] by the Labour government in 1974 marked a significant development in the form of the state's intervention in industrial relations in Britain. ACAS is a product of the 1974-79 Labour administration and its proposed role and remit can only be understood with reference to the context of the particular conditions of the time. The service was set up in a period when the Labour government, under the premiership of Harold Wilson, introduced legislation to extend the rights of working people. Legislation covered a range of issues concerned with terms and conditions of employment, such as improvements in employment protection, health and safety at work, equal pay and maternity rights[1]. The emergence of the new agency coincided with a specific stage in the development of the relationship between the Labour Party and the trade union movement; and a period of worsening economic conditions reflected in slow growth and rising unemployment and inflation. Hiving-off the Industrial Relations Branch from the Department of Employment group was interpreted as a response to the perceived conflict

between the Department's dual role in implementing and enforcing the various incomes policies, whether voluntary or statutory, of previous governments.

During its term of office, the Labour government attempted to manage the economy on the basis of Keynesian demand management policies - policies which had been pursued by both Conservative and Labour governments as part of the so-called post-war social democratic consensus[2]. The main features of the consensus were the acceptance of the role of government in maintaining a high and stable level of employment and low inflation; in intervening in industry through nationalisation; in establishing the welfare state; and in accepting an active role for trade unions in tripartite organisations [Kavanagh, 1987]. But attempts to manage the increasing demands made on government expenditure in the period, combined with the effects of the world recession, put considerable strain on the Labour government's ability to manage the economy effectively and meet its stated objectives. Before the end of its administration, and under the new leadership of James Callaghan, the government made a significant change in the emphasis of policy. Denis Healey, the Chancellor of the Exchequer, announced that public expenditure was to be cut by means of cash limits on the control of spending by departments and local government. This change is argued to have been forced on Labour by the International Monetary Fund as a condition of advancing a further loan to the government [Barnett, 1982; Kavanagh, 1987].

The government was subject to heavy criticism both from its supporters and opponents for pursuing the objective of public expenditure cuts. As cuts not only mean cuts in services or departmental spending, but also mean less money to fund the wage demands of public sector workers, the Prime Minister and his government soon ran into difficulty with the trade union movement when they tried to restrict the level of wage rise in 1978 to 5% under the terms of the Social Contract between the Labour Party and the unions. Throughout this period ACAS dealt with increasing numbers of industrial relations problems through the advisory, conciliation, mediation and arbitration sectors of the service. Although there is a rough correlation between the incidence of ACAS interventions in collective disputes and trends in recorded stoppages, the level of third party interventions has been sustained in spite of a reduction in the number of strikes in recent years [see Table 1.1]. The service was not,

however, able to prevent the events of the so-called winter of discontent which is said to have been a major contributor to the defeat of the Labour government at the 1979 general election[3].

TABLE 1.1

Total number of Collective Conciliation, Mediation and Arbitration Cases handled by ACAS 1975-1989 in relation to industrial stoppages

	Conciliation [1]	Mediation [2]	Arbitration [3]	Industrial stoppages
1975	2017	11	292	2,332
1976	2851	17	296	2,034
1977	2891	31	287	2,737
1978	2706	29	385	2,498
1979	2284	32	348	2,125
1980	1910	31	271	1,348
1981	1716	12	239	1,344
1982	1634	16	220	1,538
1983	1621	20	176	1,364
1984	1448	14	178	1,221
1985	1337	12	148	903
1986	1323	10	172	1,074
1987	1147	12	132	1,016
1988	1059	9	127	781
1989	1070	17	150	701

[1] Collective Conciliation - Completed Cases
[2] Single and Boards of Mediation
[3] Single and Boards of Arbitration

[Source : ACAS Annual Reports, 1975-1989 and Department of Employment Gazette, July 1990]

When Labour lost the election to the Conservative Party with Margaret Thatcher as its leader, it was believed that institutions such as ACAS could also disappear. On first examination ACAS appears to be the embodiment of tripartist and corporatist relationships which some did not think would survive the election of the new government which, at least in its rhetoric, was determined to break with the post-war consensus and which offered the British people 'A New Beginning' [Conservative Party 1979]. Further the new government did not disguise its dislike for quangos [Pliatzky, 1989], and the influence afforded to trade unions within such organisations. A product of the Labour administration, ACAS had been criticised in some quarters for being pro-union and in some ways responsible for tilting the balance of power in industrial relations in favour of the unions[4] - a situation which the new administration was keen to reverse:

> "Between 1974 and 1976, Labour enacted a 'militants charter' of trade union legislation. It tilted the balance of power in bargaining throughout industry away from responsible management and towards unions, and sometimes towards unofficial groups of workers acting in defiance of their official union leadership."
>
> [Conservative Party, 1979]

The Conservative government declared its intention to redefine the role of government in a mixed economy. It rejected Keynesian demand management and advocated monetarist solutions to economic problems (Grant and Nath, 1984). The priority objective was [and is still stated to be] the reduction of inflation, although the means by which this was to be achieved have changed significantly over the government's three administrations[5]. In addition the government wished to reduce government spending and the role of government in economic affairs in order to free more of the economy to market forces. Rejecting the belief, which had gained credence in the 1960s and 1970s, that the law could not intervene in British industrial relations, another major aim of the government's new agenda was the reform of industrial relations:

> "Labour claim that industrial relations in Britain cannot be improved by changing the law. We disagree."
>
> [Conservative Party, 1979]

Major changes in the activities and organisation of trade unions have resulted from the 1980 and 1982 Employment Acts, the 1984 Trade Union Act and the 1988 and 1989 Employment Acts [McIlroy, 1988; MacInnes, 1987; Taylor, 1989] in conjunction with major developments relating to other aspects of labour market supply side policies [Brown, 1988a, 1988b; Brown and King, 1988]. Yet in spite of cutbacks in its budget and its reduced workload, ACAS has remained remarkably intact during the past eleven years of Conservative control of government. At first sight this may appear to be a contradiction of the government's stated policy; and the continued existence of ACAS as an unnecessary obstacle to the free functioning of the market. However, as the discussion on corporatism illustrates, corporatist strategies are not necessarily excluded from a free market philosophy and may indeed be employed in specific forms to improve the functioning of market forces.

This thesis examines the work of ACAS with particular reference to its arbitration service and provides an explanation for the apparent contradiction between the government's macroeconomic policy stance and its continued support for an agency which appears to maintain attitudes, practices and values of the past. Using the concept of corporatism as a theoretical framework, it will be argued that notwithstanding the initial reduction in the number of cases referred to arbitration since 1979; the withdrawal of the right of access to arbitration by the government from the terms and conditions of employment of some public sector employees; and the adaptations which ACAS has made in response to changing conditions; there is a surprising degree of continuity in the work of ACAS in terms of state organised third party intervention in industrial relations in the post-war period.

Before setting out in more detail my approach to the topic, it is necessary to review the literature on corporatism and arbitration.

THE CORPORATIST DEBATE

'The time for an obituary of corporatism seems a long way off'

[Williamson, 1989, ix]

The post-war period in Britain and other industrialised countries, has been marked by the increasing complexity and role of the state in economic affairs, both nationally and internationally. After 1945, Conservative and Labour governments in Britain, operated within a framework of Keynesian demand management and became more actively involved in economic policy making. At least until the mid-1970s governments pursued the broad economic objectives of full employment, price stability, economic growth, balance of payments equilibrium and a more equitable distribution of income and wealth [Gamble and Walkland, 1984; Grant and Nath 1984].

During the post-war period and especially since the 1970s a large and diverse literature on state theory developed in order to provide some explanation and theoretical framework for understanding the nature and role of the state in the political and economic spheres. One particular strand of this literature relates to the debate on corporatism, variously described as neo-, quasi, liberal or societal corporatism [Grant, 1985]. Distinctions are made between state corporatism and societal corporatism [Schmitter, 1979]; between sectoral corporatism and corporate concertation [Lehmbruch, 1984]; between corporatism and pluralism [Williamson, 1989]; and between corporatism and tripartism [Grant, 1985]. Distinctions are also made between corporatist arrangements at different levels of the economy - at the macro or national level; the meso or regional/industry/policy community level; and the micro or firm/plant/specific policy level. Grant describes the debates on the nature of corporatism as "an attempt to understand the reciprocal relationships that have developed between the state and major organised interests in Western countries in the post-war period." [Grant, 1985, p.l] The major

organised interests which are of concern to this thesis are those which represent labour and capital in British industrial relations.

The literature on corporatism has a long history and pre-dates the use of the term to describe post-war conditions. Williamson summarises the use of the concept which preceded the rise of neo-corporatism in the 1970s as follows:

> "first, as a form of political culture; second, as a body of social and economic thought that was prominent in many European countries in the period approximately 1860-1940; and third, as the politico-economic system established in a number of authoritarian regimes in the twentieth century."
>
> [Williamson, 1989, p.22]

Further Williamson argues that although "Schmitter's 1974 essay marked the beginning of serious consideration of corporatism as a concept relevant to studying 'liberal democracies', he was not the first to make the connection. Indeed, some of the most noted writers on pressure group politics of the post-war period had discussed the development of corporatism in a number of European countries." [Williamson, 1989, p.8] He refers to the work of Samuel Beer [1956], Eckstein [1960] and Shonfield [1965] which relate to Britain; and the work of La-Palombara on Italy [1964], Rokkan on Norway [1965], Ruin on Sweden [1974] and Lowi on the United States [1969] as examples to illustrate his point.

I am mainly concerned with the revival of corporatist explanations and the development of the neo-corporatist literature which relates to the politics of industrial relations in western capitalist democracies. Before exploring the application of the concept of corporatism to a detailed analysis of the operation of ACAS arbitration, it is necessary first to set out a brief history of the development of the corporatist debate; the key features of corporatism which have been identified by different authors; the main critiques of the corporatist literature; and the relevance of corporatist theory to post-war conditions in Britain.

i] The revival and development of corporatist theory

> "Corporatism may best be conceived as a particular form of relationship between the state and organised interests in which tripartite forums are employed as a means of resolving interest conflict by bringing opposing groups into the decision-making process, and giving them some responsibility for policy outcomes."
>
> [Moore and Booth, 1989, p.14]

To some extent the revival of corporatist theory can be understood as a response to the perceived limitations of pluralist interpretations of the relationship between interest groups and the state - "The revival and recasting of corporatist explanations of these historical changes was a response to widespread feeling among academics that conventional pluralist theories did not provide an adequate apparatus to handle the changes that were taking place in the relationship between the state and interest groups based on the division of labour in society" [Grant, 1985, p.1]. Pluralist explanations have been criticised for the role assigned to the state as a neutral institution; for their failure to provide a satisfactory understanding of the changing relationship between capital, labour and the state; for not distinguishing between interest groups and governing institutions; for not understanding the key distinction of intermediation; for their inadequate treatment of power in the policy making process; and for using as a basis for their analysis the assumption that there is open competition between interest groups and no barriers to entry into the competition [Grant, 1985; Williamson, 1989]. Different strands of pluralist theory view the state either as a neutral arbiter impartially mediating between contending economic and political interests in society [arbiter theory]; or as actor in the policy making arena [arena theory]. The distinction between the two approaches implies different roles for the state. The arbiter theory allows for an interventionist role for the state and some control over the recognition of legitimate groups in society and the balance of power between them. The arena theory implies a participatory role for the state as only one of the actors in the policy making arena

where the distribution of power in society is given [Grant and Sargent, 1987; Jordan and Richardson, 1987].

However, Williamson [1989] argues that it would be misleading to perceive the development of corporatist debates solely as a response to criticism of pluralism as he considers that corporatist writers in more recent times have also reacted against the other, longer-established alternatives to pluralism, most notably Marxist and traditional elite models. He does concede, however, that "the argument with the pluralists is by far the most prominent and heated." [p.4].

In his most recent work, *Corporatism in Perspective*, [1989], Williamson outlines and summarises the main ideas put forward in corporatist theory:

> "What I wish to establish is that corporatism provides a set of ideas and general propositions which provide a valid and interesting way of thinking about organized interests and their relationship to the state."
>
> [Williamson, 1989, p.xi]

The development in corporatist theory post-1974 is divided into three 'generations' or time periods by Williamson, although he acknowledges that the divisions may not be as distinct as the categories imply.

In the 'first generation' [1974-1979] he includes the work of Schmitter and Lehmbruch and their edited volume entitled *Trends Towards Corporatist Intermediation*, [1979]; and the contributions of Panitch, [1979] and Jessop, [1979]. While there are differences between the various authors involved, central issues can be identified:

a] Schmitter's discussion of corporatism as a system of interest intermediation, ie the relationship between organised interests and public authorities;

b] Lehmbruch's analysis of the material conflict between capital and labour in the form of incomes policy;

c] the development of a theory of the state by Panitch and Jessop;

d] the differential development of corporatism in different polities; and

e] the need to theorize different components of the corporatist model.

In addition to the authors involved in the above - the 'Corporatist Internationale' as they described themselves - Williamson cites the work of Alan Cawson [1978] which began the examination of the uneven development of corporatism in a single polity; and Colin Crouch [1977 and 1979] which identified the problem of distinguishing between pluralism and corporatism and the co-existence of the two arrangements.

Commenting on phase one, Therborn [1987] considers the most significant contributions to the debate to be the concept of intermediation introduced by Schmitter and the concept of concertation discussed by Lehmbruch. Grant [1985] also cites the contribution of the distinction between state and societal corporatism identified by Schmitter [1979]. He outlines the distinction as follows:

> "State corporatism is imposed from above, whereas societal corporatism grows from below. State corporatism is based on dependent organisations penetrated by the state; societal corporatism emerges from the full development of autonomously formed organisations which reach a stage where they feel they can bargain with government as nearly equal partners."
>
> [Grant, 1986, p.36]

The distinction introduced by Lehmbruch between 'sectoral corporatism' and 'corporatist concertation' is also summarised by Grant.

> "Sectoral corporatism is limited to specific sectors of the economy and involves privileged access to government for particular interests. Corporatist concertation involved agreement among potentially antagonistic interests, such as capital and labour, about the management of the economy."
>
> [Grant, 1986, p.40]

Williamson argues that the 'second generation' [1980-1983] is best represented by two collected works - one edited by Suzanne Berger, *Organizing Interests in Western Europe* [1981], and the other by Lehmbruch and Schmitter, *Patterns of Corporatist Policy Making* [1982]. These works represented both a consolidation of earlier discussions and the introduction of new issues. The key contribution of the second phase can be identified as:

a] The recognition that the analysis was just beginning to come to terms with the central issues and thus could be interpreted as a new research agenda;

b] the identification of two distinct but linked usages - [i] interest intermediation and [ii] policy making and implementation;

c] the development of the dual politics thesis [Cawson and Saunders] where different types of intervention were associated with different types of interest group politics and which concluded that intervention into production was achieved through corporatism;

d] the argument that society may not just be constrained by organised interests, but also shaped by them;

e] the introduction of the problem of governability in the face of rising demands on the political system [Schmidt];

f] comparative analysis of different polities; and

g] the development of the theory beyond the macro level to other levels of policy making.

Finally, the 'third generation' [1984-1987] is stated by Williamson to be distinctive because of the separation of the analysis between those authors such as Goldthorpe [1984] and Scholten [1987] whose work is concerned with the national or macro level of policy; and Cawson [1985] who has continued his work at the sectoral/meso level of analysis. One development of meso analysis relates to the notion of 'private interest government' [Streeck and Schmitter, 1985], which refers to the application

of corporatist theory to the changing relationship between private interest associations and the community, the market and the state [Grant & Sargent, 1987] - to form a 'corporatist-associative order'.

> "Thus parts of the economy, and the wider society, are regulated by 'private' associations performing a 'public' role, as opposed to being regulated through either the market or the state bureaucracy.
>
> [Williamson, 1989, p.18]

A common feature of the studies in this period is the use of empirical data.

Although conceptualizing the development of corporatist theory into different time periods has analytical advantages, Williamson is the first to admit that such summaries of the literature are limited. Useful additions to his summary would be the work of Middlemas [1979, 1983 and 1986], which pre-date Williamson's 'first generation'; and the contribution of Moore and Booth [1986 and 1989], which is a more recent development of the debate.

A historical perspective is taken by Keith Middlemas in his identification and analysis of the concept of 'corporate bias'. Middlemas traces the development of corporate bias to the inter-war period as a strategy of crisis avoidance adopted by government whereby the two sides of industry, employers' organisations and trade unions, are elevated to a new form of status, moving from interest groups to what he describes as 'governing institutions'.

> "Equilibrium was maintained because the governing institutions came to share some of the political power and attributes of the state, itself avid to admit representative bodies to its orbit rather than face a free-for all with a host of individual claimants. I have called this process corporate bias, but it should not be confused with the corporate state of classical Fascism ..."
>
> [Middlemas, 1979, p.20]

The association between government, trade unions and employers' organisations is viewed as operating within a consensual framework [a theme which I shall explore in subsequent chapters] and involving a

subordination of the role of parliament. By 1945, according to Middlemas, corporate bias had replaced, for all practical purposes, classical democratic theory as that had been understood since 1911. Middlemas's thesis has been criticised on the grounds that the relationships he describes as corporate bias can be identified in the period before 1914 [Davidson in Smout, 1979]; and on the basis that trade unions and employers' organisations did not determine principles of policy but were confined to administration of policy [Lowe, 1980]. Nevertheless Middlemas has made a significant contribution to the understanding of the relationship between the state and the two sides of industry which he has developed in his later works [Middlemas 1983 and 1986].

A more recent contribution to the corporatist debate can be found in the work of Moore and Booth and their application of corporatist theory to the politics of decision-making in Scotland. The basis of their argument is that speculation about the death of corporatism is premature and that new forms of bargaining and negotiation between interest groups and the state below the macro or national level have developed and survived the administration of a so-called anti-corporatist Conservative government. In arguing that corporatism and pluralism are both limited concepts, Moore and Booth develop their own concept of 'negotiated order' which they place somewhere between corporatism and pluralism, or between state imposed solutions and market forces[6]. Negotiated order comprises three key elements. The first is the existence of an institution, either formal or informal, to articulate the interests of organized interest groups; the second, is the indentification of the parties involved ("one side is normally either a representative of the state or a surrogate who acts as an agent of the state ... On the other side will be representatives of organized groups who have a particular self-interest to pursue" - p.115]; and the third, is that the parties involved in such arrangements are responsible and accountable for the attainment of agreed objectives. In distinguishing between the three concepts, Moore and Booth argue that corporatism involves three key elements - representation, responsibility and control - and can only be said to exist where these three elements are in existence. Pluralism is differentiated because it involves representation of interests, but does not imply policy responsibility or control over members; and negotiated order combines partial representation and a degree of policy responsibility, although it lacks the necessary control element.

While Moore and Booth have made an important addition to the debate by identifying the three distinguishing features necessary in any definition of corporatism, their work is also open to criticism. First, the key elements identified by them may be labelled differently by other authors. Second, it is unclear whether their additional concept of 'negotiated order' clarifies or adds to the analytical confusion surrounding definitions of corporatism.

A conceptually distinct approach to the corporatist debate is to be found in Marxist theory, where analysis of corporatism developed in conjunction with debates in the Marxist literature on theories of the state. The essential feature of a Marxist approach to a theory of the state is that the state is not seen as neutral, rather the state, in a capitalist society, will ultimately represent the interests of the dominant class, ie. the capitalist class. Different schools of Marxist theory of the state exist, including the instrumental, structuralist, state monopoly capital, capital logic and the Frankfurt schools. The essential difference between them centres on the role attributed to the law of value and class struggle[7]. Kerry Schott provides a useful summary of Marxist theories of the state, although she dismisses them rather too lightly because of the emphasis she gives to one aspect of Marxist theory, namely that "their analysis does not allow for any real increase in the strength of the working class." [Schott, 1984]. Yet the work of Holloway and Picciotto, to which she refers, specifically analyses the role of class struggle and the changing strength of the working class. However, Schott does concede that:

> "If the state is not the public-interested and enlightened actor so often assumed in basic economic policy models, and if individuals are not the appropriate unit for analyzing state economic behaviour, then Marxist analysis may clearly have insights to offer."
>
> [Schott, 1984, p.102]

A number of Marxists including Panitch, Jessop and Crouch have addressed the concept of corporatism. Corporatist arrangements, which Panitch describes as:

> "the integration of central trade unions and business organisations in national economic planning and incomes policy programmes and bodies."
>
> [Panitch, 1976]

are criticised on the grounds that such arrangements weaken the power of organised labour and displace the conflict within the labour movement itself. For Panitch the integration or incorporation of trade unions weakens labour, as the organisational body [in Britain the TUC] is also used by the state to act as an agent of social control over its members especially in attempts to limit wage inflation in the 'national interest':

> "What exactly is deemed to be in the national interest and what sacrifices the working class is asked to bear in its name is conditioned by the state of the British economy and the perception of the correct national policy widely accepted by industrial, financial and political leaders of the British upper class."
>
> [Panitch, 1976]

For Jessop [1980] corporatism involves a decrease in parliamentary representation and an increase in functional representation. In contrast, other non-Marxists such as Samuel Brittan have argued that, rather than reducing the power of labour as argued by Panitch, corporatism has involved giving excessive rights to organised interests, notably trade unions, which in turn has posed a threat to liberal democracy [Brittan, 1975]. Finally, Colin Crouch has made a significant contribution to corporatist debates. Crouch analyses corporatism as a strategy of domination in the area of industrial relations at times when labour cannot be subordinated by other means. He contends, however, that significant benefits can be won for labour in their bargains with the state [Crouch, 1977 and 1979].

ii] When is corporatism, corporatism? The Key Features

> "One of the main limitations of the corporatist debate has been a lack of agreement, among those taking part in it, about what the term means."
>
> [Grant, 1989, p.32]

A major difficulty in identifying the key features of corporatism is in defining the precise relationships between the state and organised interests at any given time between two potential extremes. That is between the free market forces versus the state imposed solutions [Moore and Booth, 1989]; or as described by Crouch [1985] between contestation and authoritarian corporatism. As discussed above, Moore and Booth very clearly identify where they consider the boundary divisions between the three concepts of pluralism, negotiated order and corporatism exist. But the key features identified by them, namely representation, responsibility and control would not be accepted, or may be labelled differently, by other authors. As Grant and Sargent state there is little general agreement about what the term corporatism actually means [Grant and Sargent, 1987, p.17].

For example, there is considerable debate as to whether corporatism can be distinguished from pluralism - "some writers see corporatism as a sub-type of pluralism" [Grant and Sargent, 1987, p.17]; Schmitter [1979] argues that the two perspectives share a number of basic assumptions; and Crouch [1985] argues that there can be boundary problems between the two concepts. One distinction made between writers on pluralism and corporatism described by Jordan and Richardson [1987] rests on their different treatment of the state.

> "The pluralists appear to consider 'state' to be no more than a synonym for government. Other writers present the state as a vital and distinct concept."
>
> [Jordan and Richardson, 1987, p.19]

For Grant [1985] another distinction is that pluralism can refer to "an intensive consultative relationship", whereas corporatism involves "designated organisations in the implementation of policy." [p.3][8].

It is also argued that corporatism should be distinguished from tripartism, although some authors use the terms interchangeably. Grant describes tripartism as "a weak form of liberal corporatism in which the state, capital and labour engage in macro-level discussions on economic policy" [Grant, 1985, p.9], on the basis that discussions which take place under a tripartite relationship result in general guidelines for the conduct of policy with no firm commitment on those involved or mechanism for implementing the decisions made. Further corporatist arrangements need not involve three actors in the policy making process - they can be two-sided [bipartite] or involve more than three parties.

For Grant and Sargent [1987] the key features of corporatism are intervention, intermediation, and incorporation. To explain the particular mode of intervention which could be described as corporatism, they quote [Cawson, 1982, p.66]:

> "The state is neither directive nor coupled to an autonomous private sphere, but is intermeshed in a complex way which undermines the traditional distinction between public and private."
>
> [Grant and Sargent, 1987, p.16]

Intermediation refers to:

> "the particular kind of relationship that develops between the state and organised interests operating corporatist arrangements. The organised interests do not simply negotiate agreements with the state, they try to ensure that their members comply with the terms of those agreements. The state shares some of its authority with organised interests, but in return the interest groups are expected to regulate as well as represent their members."
>
> [Grant and Sargent, 1987, p.16]

And related to the last point,

> "incorporation refers to the fact that organised interests involved in corporatist arrangements are necessarily drawn closer to the state; the price of partnership is some loss of autonomy. This is particularly true for the unions...."
>
> [Grant and Sargent, 1987, p.16]

In considering corporatism as a theory or theoretical framework for analysis, rather than constructing a formal definition, Williamson [1989] summarises the key components as follows[9]:

1. restructuring of the relationship between producers, producers' associations and the state in favour of the state;
2. establishment of basis upon which the state licenses the behaviour of interest associations;
3. hierarchical distribution of power within interest organisations;
4. restriction of access for producers to effective associations to those dependent on the state and hierarchically structured;
5. restriction of essential services to members of the association, in effect compulsory membership;
6. role of interest associations in ensuring compliance with bargains reached between them and the state;
7. role in the implementation of public policy, including representation on public regulatory agencies, of regulating the non-members and members alike;
8. in certain circumstances, attempts may be made to 'disorganize' producers so they are less able to oppose regulatory powers delegated to private associations;
9. existence of corporatism at macro, meso and micro levels of the economy in addition to welfare services;
10. association with political dualism with privileged access being afforded to certain interests on the basis of their relative power and at the expense of electoral channels of representation.

Clearly, however, even these attempts at clarification do not eliminate all the boundary problems which can still exist. Another area of contention is the extent to which different forms of state relation can co-exist within a single polity. The dual polity thesis has been developed by Cawson [1982] in his analysis of meso-corporatism. Cawson argues that within capitalism there can be two different forms of interest representation and intermediation depending on whether a firm is operating in the competitive sector of the economy or the corporate sector dominated by large business corporations. In the competitive sector policy making will largely be determined by pluralist relationships; and in the corporate sector organized interest groups will enter into bargains with the state which can be categorised as corporatist. Cawson has extended his analysis to the area of micro-corporatism to describe certain relationships between the state and individual firms [Cawson, 1986] This and other developments of corporatist theory have been attacked by some authors and it is to these critiques that we now turn.

iii] Corporatism - pluralism by another name?

> "The argument that corporatist theories are insufficiently distinguished from pluralist theories gains some force from the fact that writers on corporatism admit that the two bodies of theory share some common assumptions."
>
> [Grant, 1989, p.33]

The corporatist literature has been open to criticism from both its supporters and opponents. The former group identify the following problems with the development of corporatist theory. First, the over-emphasis on macro level analysis [Cawson, 1982]; second, the tendency to ascribe an artificial coherence to state intervention [Schmitter 1985]; third, the poor or underdeveloped analysis of the state [Cawson, 1985]; fourth, the mis-use or elastic use of the concept [Moore and Booth, 1989]; and

fifth, the concentration on producer groups at the expense of consumer groups [Grant and Sargent, 1987].

As indicated above, the most heated attack has come from pluralist theorists. Grant [1985] summarises the four main criticisms in the pluralist counter-attack as: first, that corporatist writers have misrepresented the density and richness of pluralist writing; second, that despite placing emphasis on the state, corporatists have little to say about it; third, that corporatism is nothing more than a particular form of pluralism; and fourth, that there is an inherent uncertainly in corporatism about the relationship between structure and function.

One example of the pluralist counter-attack can be found in the work of Jordan and Richardson [1987]. Their main objections are: first, that corporatism is not as novel as it claims and shares features of and is very similar to pluralism; second, that it does not fit the empirical picture; and finally, that it allows for less vigorous variants.

Another example is to be found in the essay by Andrew Cox [1988]. While accepting that the 'Old Testament' of corporatism which refers to relationships within the corporate state does have some merit, Cox attacks the 'New Testament' of neo-corporatism on the grounds that it has not led to significant new insights into how policy is made or implemented; it is not unique; and it has added to the confusion surrounding the topic. Specifically Cox questions the corporatist interpretation of pluralism and argues that it is not necessary for open access, equal participation and a neutral state to be present in each particular policy arena for pluralism to exist. He attacks the separation of societal and state corporatism by Schmitter; attacks the notion of the dual state thesis on the grounds that pluralism and corporatism cannot co-exist; scorns attempts to analyse corporatism at different levels of policy making and especially the inclusion of bipartite arrangements; and accuses corporatists of trying to construct one definition which will apply to all countries at all times and for failing to analyse the gains and losers from so-called corporatist relationships.

In reply to Cox, Cawson [1988] challenges Cox's interpretation of the work of Schmitter and his discussions of pluralism, corporatism and dual state thesis. In contrast, Cawson argues that pluralism and corporatism can co-exist and are always found in combination; and that, unlike some pluralists who wish to deny the very existence of corporatism, corporatists do not want to deny that pluralist relationships in society can be identified.

> "A close inspection of Schmitter's 'Still the century of Corporatism?' reveals a different purpose, however, which was to specify corporatism as one of a number of possible ideal types of interest representation systems among which were pluralism, monism and syndicalism."
>
> [Cawson, 1988, p.309]

Therefore, corporatists have not tried to construct one theory which applies to all situations and relationships and have developed their work on different forms of corporatism - state and societal; bipartite and tripartite; and at the macro, meso and micro levels of analysis. Cawson concedes that "corporatist theory remains underdeveloped" but argues that:

> "corporatist theory has succeeded in challenging the notion of a monolithic state with some kind of essential unity and has shown that modern capitalist states are complex structures which link with economy and society in different ways. Neither pluralism nor corporatism alone can capture this complexity, which would appear to require a more sophisticated understanding than we have at present of both corporatism and pluralism."
>
> [Cawson, 1988, p.315]

iv] How relevant is the corporatist debate to an analysis of conditions in post-war Britain?

As discussed Middlemas has analysed the tendency to 'corporate bias' in Britain, particularly in the post-war period:

> "I concluded [in 1979] that corporate bias was a characteristic of the modern British political system and, indeed, in different forms, of other Western industrial nations."
>
> [Middlemas, 1986, p.7]

Middlemas acknowledges that while he developed the concept of 'governing institutions' to distinguish the representative institutions who shared in the operations of the state from political lobby or pressure groups, this did not imply formal incorporation of such institutions as they were, except in wartime,

> "unable to deliver the general consent of their members on issues that at various times were believed to be vital to government. ... Corporate bias was therefore a tendency common to a particular stage of evolution in industrial society."
>
> [Middlemas, 1986, p.7]

Again, taking an historical perspective and adopting a very broad definition of macro corporatism, McCrone et al [1989], start from the premise that corporatism did exist in Britain post 1920 without entering the debates outlined above. They explore what they describe as 'the British road to corporatism' before outlining the main critiques from the left and the right of the political spectrum. The left were mainly sceptical and suspicious of corporatist relationships and feared the incorporation of working class demands in favour of capitalism. However, according to McCrone et al the most sustained and vigorous attack against corporatism was launched in the mid-1970s by a new and radical New Right. Such an attack was fuelled by dissatisfaction with the increasing interventionist role of governments in the post-war period and with fear of ungovernability and government overload. The decision to withdraw from corporatist relationships by the new Thatcher administration is argued to be in line with the government's monetarist policies and its sustained attack on the operation of trade unions. The argument advanced by McCrone et al is vulnerable on the grounds that the authors accept rather uncritically the existence of corporatism in Britain and use the term loosely to describe post-war conditions.

In comparison, more in-depth or empirical studies have questioned the extent of successful corporatism in Britain especially at the macro level. Even if the TUC and CBI had wanted to exert control over

their members, it is argued that the very structure of organisations like the TUC and the voluntarist nature of British industrial relations means that it is unable to guarantee the acceptance of its members to decisions reached with government[10]. That is, neither organisation was necessarily able to deliver the agreement reached with government. Although it may be possible to describe the relationship between the government and the two sides of industry at the macro level as tripartist, Grant [1985] argues that the relationship did not amount to an effective corporatist arrangement.

The closest Britain came to corporatism is argued to be in the period 1972-79 during the administrations of the Conservative government led by Edward Heath and the Labour government led by Harold Wilson and James Callaghan. Governments in this period experienced stagflation and attempted to manage high levels of inflation and unemployment through incomes policy. The Social Contract entered into by the Labour government with the unions prior to taking office in 1974, whereby increased welfare and employment rights were afforded to trade unions in return for their acquiescence on pay levels, is argued by some to be the peak of corporatist arrangements in Britain. However, it is contended that the attempts at, what Crouch [1985] describes as, bargained corporatism during this period could not be sustained and ultimately broke down during the so-called winter of discontent followed by the election of the first Thatcher government in 1979. Thus although Britain may have appeared to be a fruitful arena for corporatism at this time, Williamson [1989] argues that the weakness of the key associations, that is the TUC and the CBI, combined with strong liberal traditions in Britain worked against attempts to establish an enduring form of coporatism [Williamson, 1989, p.147]. At best Britain is described as having weak corporatism at the macro level[11], although other studies provide evidence of the existence of corporatism at the meso and micro level. Indeed the collapse of macro corporatism may be associated with the fostering of new meso corporatist arrangements [King, 1987] or what Grant describes as a move towards sectorally based privileged forms of corporatism [Grant, 1986, p.38]. For example, Moore and Booth go so far as to argue that the UK has very weak tripartite arrangements at the macro level and that those organisations such as NEDO which have survived the Thatcher governments have become "largely symbolic forms of interest

representation lacking any responsibility or control. However at other levels of the political economy we can find interesting examples of corporatist arrangements." [Moore and Booth, 1989, p.144].

As will be evident from the above discussion, conclusions about the existence of corporatism in Britain will depend on the precise definition or criteria identified and which level of political economy is under examination. Nevertheless, in spite of the fact that there is no general agreement in the literature either on an adequate definition of the term, or the existence of corporatism in Britain, it has a strong common currency. First, it is used by commentators as a broad description of the pre-Thatcher post-war eras as a way of distinguishing the period from the experience of the Thatcher administrations which were to follow. In particular it is used by writers on industrial relations to describe attempts by pre-Thatcher governments to work in partnership through a consultative relationship with the trade union movement. In contrast the Thatcher governments were renowned for their deliberate exclusion of trade union leaders from discussions on industrial relations or other matters[12]. Second, it is used as a pejorative term by members and supporters of the Thatcher administrations to discredit the management of the economy by past governments, especially their attempts to reduce inflation through incorporation of the trade union movement[13]. Therefore, although there are severe limitations in using corporatism as a theoretical concept in any analysis of post-war conditions in Britain, it could be argued that any analysis which ignored the issue of corporatism would also be inadequate.

v] How relevant is the corporatism debate to an analysis of current conditions in Britain?

Given that one of the key features of corporatism identified above was intervention, the application of corporatist theory to conditions and relationships in the 1980s has been questioned. Significant changes have taken place in the relationship between the state and organised interests since the election of the Conservative government in 1979 and the past ten years have been marked by the government's attempt to disengage itself from direct intervention. 'Rolling back the frontiers of the state' was an oft quoted intention of the Thatcher administrations [Gamble, 1988].

One attempt to analyse the new forms of state-organised interest relationships is the dualist tendency identified by Goldthorpe [1984]. Goldthorpe argues that a dualist tendency has re-emerged in recent years as governments have attempted to offset the power of organized interests [particularly labour] in the economy, by increasing areas of the economy within which market forces and associated relations of authority and control can operate more freely. Thus the objective is to decrease the role of organized labour, increase the power of unorganised groups, strengthen employers' interests and encourage the free operation of market forces. A major source of dualism in the past was the use of migrant labour to counteract the rigidities in the indigenous labour market. More recently Goldthorpe has identified dualism in countries like Britain where employers have adopted new forms of production which weaken labour and where there has been an increase in temporary, contract and part-time work. Corporatism and dualism can co-exist, according to Goldthorpe, although there will be tensions between them, and also the actors who play a crucial role will change. Under corporatism the trade unions had a dominant role, but under dualism trade unions are excluded from government decision making and instead employers and their managers are of crucial importance. The government can play a strategic role in encouraging dualism and promoting employers' interests by passing legislation reducing the power of trade unions and employment protection, changing social policy legislation and by retracting its own areas of responsibility. The concept of dualism has been taken up by some writers and applied in

particular to labour market policy [Brown and King, 1988; Hyman, 1989; and Longstreth, 1988], although Longstreth contends that "dualist models of the labour market have remained largely at the descriptive level, lacking analytical precision or even any clear definition." [Longstreth, 1988, p.428]. Therefore, as with corporatism, there are problems in the application of the term dualism.

The assumption inherent in some discussions and analysis of the 1980s is that neo-corporatism can only apply to times of consensus politics and a broadly socialist approach to running an economy. However, Bonnett and Jessop argue that:

> "Once we break through the rhetoric of Keynesianism versus monetarism, we find that both are effectively associated with forms of meso and macro level intervention as a condition of their successful implementation and that each has specific conditions of existence in the social basis of state power and the management of resistances."
>
> [Bonnet and Jessop, 1981]

Further Moore and Booth [1989] contend that corporatist arrangements can fit into one ideological approach or another, that is into a broadly socialist or a market economy where a supposedly liberal state may encourage certain relationships in order to rectify defects or dysfunctions of the market. Therefore, a free market government may allow certain relationships to continue: [a] because a totally free market would not be possible in practice and the alternative option of direct government control is politically unacceptable; [b] because it can provide a managed market; and [c] because it can ensure efficiency. Extending the discussions further McCrone et al argue that any government has to find some means of managing its relations with capital and labour, and speculate that:

> "some form of corporatism will be back on the political agenda before the end of the century .... It would be a considerable irony if Mrs Thatcher had proved to be its midwife."
>
> [McCrone et al, 1989]

These contributions provide some insights into the continuation of certain relationships which could have been expected to cease after the election of a supposedly free market government in 1979. Such

discussions of the significance of corporatist theory to the 1980s is of particular relevance to my examination of the arbitration service of ACAS and will be explored in more detail below and in the chapters which follow.

THIRD PARTY INTERVENTION - THE ROLE OF ARBITRATION

> "Arbitration is one of the methods of resolving industrial disputes. Those who contemplate or advocate its use should be aware of its strengths and limitations. It is not suitable for every occasion but in some circumstances it can provide a way of reaching a settlement acceptable both to employers and unions."
>
> [Lockyer, 1979]

The above quote is taken from the Foreword to John Lockyer's *Industrial Arbitration in Great Britain*, a book which Jim Mortimer argued "should become the authoritative published work on arbitration." [Lockyer, 1979]. John Lockyer was the civil servant responsible for the ACAS arbitration service from its inception in 1974 until his retirement in the early 1980s. In writing the book Lockyer was responding to a plea for more information about arbitration. Although it was published in 1979, and in spite of changes which have taken place since that date, this work is a useful source of information for those who are unfamiliar with the processes of arbitration, as it outlines the nature of industrial arbitration; the type of issues which lend themselves to and come to arbitration; the methods, arrangements and process involved; the nature of the arbitration award; and finally the role of arbitration in resolving industrial relations problems. Lockyer argues however that his book is not an academic treatise on industrial relations, but rather is mainly intended for management and trade union officials engaged in industrial relations activities.

In common with the literature on corporatist theory, there is a wide and varied range of literature on the state's intervention in industrial relations and in relation to third party intervention and the role of ACAS arbitration. This literature on third party intervention and arbitration has developed in different disciplines including industrial relations [Bain, 1983; Clegg, 1979; Allen, 1964]; history [Amulree, 1929; Davidson, 1985; Lowe, 1982; Sharp, 1950]; politics [Hyman, 1972, 1975, 1989; Crouch 1979]; economics [Hunter, 1977, 1983]; law [Rideout, 1986; Williams, 1983];

sociology [Crouch, 1977]; and social psychology [Morley and Stephenson 1977; Webb, 1982, 1986].

Also the literature has developed in relation to specific debates surrounding the use and the process of arbitration, such as compulsory arbitration [Fleischli, 1980; Institute of Directors, 1984; Minford and Peel, 1983; Stevens, 1966]; no-strike deals [Burrows, 1986; McDowall, 1984]; straight choice, flip flop or pendulum arbitration [Treble, 1984; Wood, 1985]; the use of arbitration in unfair dismissal cases [Concannon, 1980; Rideout, 1986; Williams, 1983]; the process involved [Lockyer, 1979; Sullivan, 1980]; pay disputes [Towers and Wright, 1983]; the prevention of strikes [Kessler, 1980; Wootton, 1983]; and the potential scope and expansion of arbitration [Johnston, 1975; Lowry, 1986; Mortimer, 1981]. In addition, there is a broad range of comparative analysis which compares the practices in Britain with those in other countries [Sawbridge, 1986; Mackie, 1986; Owen Smith, Frick and Griffiths, 1989]

Finally, there have been detailed examinations of other aspects of ACAS's work, namely the advisory function, conciliation and mediation. As indicated in the opening quotation, arbitration is only one of the methods of resolving industrial disputes in Britain. It is worth making the distinction between conciliation, mediation and arbitration in order to understand what arbitration is and how it differs from the other means of settling industrial disputes.

> "Conciliation is a process where a neutral third party meets the opposing sides and endeavours to help them reduce their differences and so reach a settlement."
>
> [Lockyer, 1979, p.6]

Most conciliation in Britain is carried out under the official auspices of ACAS and the third party referred to is normally a civil servant employed by ACAS. ACAS is responsible for two forms of conciliation, individual and collective[14]. A large degree of control still rests with the parties to this process, and the role of the third party is mainly confined to bring the parties together in an attempt to reach a mutual resolution of the problem.

> "ACAS has defined the process of mediation as 'a method of settling disputes whereby an independent person makes recommendations as to a possible solution leaving the parties to negotiate a settlement'. The mediator goes further than the conciliator by putting forward his own positive proposals aimed at settling the dispute."
>
> [Lockyer, 1979, p.8]

The independent person in mediation cases is not an employee of ACAS but is appointed by ACAS from a list of arbitrators and mediators. Under mediation, the parties still retain a degree of control as they are under no obligation to accept the recommendations on the terms of a settlement proposed by the mediator.

> "Arbitration differs from conciliation and mediation in that the arbitrator determines the outcome of the dispute by making a decision or 'award' which the disputing parties at the outset, agree to accept."
>
> [Lockyer, 1979, p.10]

The arbitrator is appointed by ACAS from a list of arbitrators[15] and like mediators, [s]he is not a civil servant. It is in arbitration that the parties have least control over the outcome of the process in that they give up the final decision to an outside independent person. Although the parties are morally bound to accept the outcome of the arbitration, they are not legally bound to do so. In practice, failure to implement arbitration awards is extremely rare[16].

Before embarking on the detailed study of ACAS's arbitration service, a survey of investigations of other aspects of ACAS's work was conducted. This was useful for at least two reasons. First, because they provided models for the arbitration survey and points of reference for comparing the different functions. And second, because in order to understand arbitration as the final stage, or as some describe it the last resort, in third party intervention, it is necessary to have a clear understanding of the demarcation lines between the different processes. Therefore, although arbitration is offered as a separate service by ACAS, it normally occurs only after other avenues of dispute resolution have been exhausted. The rationale behind this practice can be traced to the development of

'voluntarism' in British industrial relations[17]. It is a rationale which I found to be reinforced by the parties, civil servants and arbitrators involved.

i] Advisory, Conciliation and Mediation Work:

[a] Advisory

A major study of the advisory role of ACAS was undertaken by Armstrong and Lucas [1984 and 1985]. Their research was conducted during the period 1982 and 1983 when more than half of the ACAS advisory staff in ACAS regional offices were interviewed and evidence was gathered by questionnaire survey from 548 ACAS clients [460 from companies and 88 local trade union representatives]. A further 80 responses were received from a questionnaire issued to 'interested parties' - employers' associations, trade unions, management consultants and professional/training institutions.

The advisory work is divided between advisory visits, either requested or non-requested, and in-depth work. The distinction between the different types of service relates to the time spent on the issues on which advice is sought. The questionnaire survey of clients was divided between 258 advisory visits and 290 in-depth studies.

The responses from the survey demonstrated a high degree of satisfaction with the service offered. Over 98 per cent of request and non-requested visit clients judged the style of advice presented to be appropriate to the circumstances of the case, while 98% of requested visits [89.5% of non-requested visits] thought the advice or information given was very good or good. Where advice was requested, 85.8% of clients had implemented the advice in full or to an appreciable extent. When asked whether they would use the service again, 94% of all clients, both requested and non-requested visits, answered in the affirmative. These results led Armstrong to conclude that there was a "significant measure of general client satisfaction with the advisory visit." [Armstrong, 1985, p.144].

A similar level of satisfaction was expressed in relation to the in-depth work, although some differences between the employers and trade union appraisals were noted. Ninety-seven per cent of employers

considered the style of advice to be appropriate and 92% of unions; and 93% of employers and 90% of unions said the advice received was very good or good. Eight-seven per cent of employers had implemented the advice fully or to an appreciable extent, and 64.5% of unions. Finally 96% of employers said they would use the service again and 95% of trade unions.

The impartiality and sound advice received from the service were noted as the factors of most importance to the group of interested parties; with a combination of independence and impartiality the most important factors for the client group. Ninety-four per cent of the client group considered that the service should continue to be free [90% of interested parties] and that the impartiality and independence of the service would be damaged by any payment system. Armstrong concluded that:

> "Most respondents, clients and interested party alike, seemed strongly in favour of maintaining the status quo position of ACAS independence and free advisory service. Furthermore, the overall results of the survey .... constitute a broad measure of client and interested third party satisfaction with ACAS advisory performance."
>
> [Armstrong, 1985, p. 146]

Armstrong and Lucas [1985] acknowledge that their findings are open to criticism on the grounds of sample bias in favour of satisfied clients and low response rates. However, they support their evidence on the basis of the quality of the 548 replies received.

[b] Conciliation

A more restricted study of ACAS conciliation cases was conducted by Jean Hiltrop [1987]. Hiltrop examined the records of a number of collective conciliation cases undertaken in Yorkshire and Humberside Region, and talked to the conciliators who were responsible for the cases. Hiltrop was interested in testing a number of hypotheses about the effect on the success rate of conciliation measured in relation to the dispute ['situational factors'] and to the conciliator involved ['conciliator characteristics' and 'conciliation techniques'].

The situational factors related to the nature of the principal issue in the dispute; the intensity of conflict involved; the number of employees involved; the source of the request for conciliation; the characteristics of the trade union involved; and federation of the employer. Hiltrop's results demonstrated that the major factors that were particularly beneficial to the success of conciliation were the pay-relatedness of the dispute; whether there had been a management only or joint requests for conciliation; the union's prior success in settling disputes through conciliation; and the union having relatively little experience with conciliation. In addition Hiltrop argued that conciliation is less successful in the absence of actual or threatened industrial action.

Hiltrop also looked at the impact on success of the experience [number of previous cases] and skill [defined as the conciliator's previous success rate] of the conciliator involved. He argued that previous experience was critical and that both experience and skill affected the likely success rate of cases, with the more experienced and skilled conciliator being responsible for higher success rates.

Finally Hiltrop examined the techniques employed by conciliators during a conciliation case. He found that conciliators employed combinations of techniques in disputes; that no single technique contributed greatly to success; that some techniques were used in all cases; and that they were highly effective in some situations.

From this study, Hiltrop claims that he can predict the success of conciliation with an 86% certainty. This claim should be treated with some caution, however. First, as Hiltrop himself acknowledges, his list of variables are by no means comprehensive; second, some of them can only be measured very subjectively; third, no attempt was made to measure the skill with which particular techniques were used; and fourth, it is questionable whether the whole complexity of the process can be measured in the way Hiltrop proposes. In particular one has to be extremely careful about the concept of 'success' applied. Success in these terms normally means that the case is settled to the extent that it is 'off the conciliator's book' without reference to the future relationship between the parties. Therefore, such success may be very short-lived.

A different survey of conciliation was conducted before the establishment of ACAS in 1974 as part of the Department of Employment conciliation service. This survey of the attitudes of the parties in conciliation was conducted by Goodman and Krislov [1974] through a questionnaire survey of all parties involved for the first six months of 1972. Questionnaires were sent to 282 management representatives, 249 trade union representatives and 49 conciliation officers with an overall response rate of 44%. Contrary to the publicity given to the perceived lack of independence of the Department of Employment, the parties indicated a high level of satisfaction with the neutrality shown by conciliation officers; considered that the service performed a useful function; and three-quarters of them said they would use the service again in similar circumstances.

Finally, a study of individual conciliation cases concerned with unfair dismissal was conducted by Dickens et al (1983) as part of a larger project on third party intervention in industrial relations. This research involved a postal survey of the parties to conciliation based on a ten per cent sample of all conciliation cases in the period 1 February 1977 to 31 January 1978, excluding cases involving trade union recognition. Although the researchers identified various problems with the industrial tribunal system, and ACAS's role within it, their survey evidence suggested that both sides had a high regard for the service which ACAS provides and would use it again if a similar issue arose. Dickens et al (1985) followed up their interest in ACAS's involvement in unfair dismissal cases as part of a broader

study of the industrial tribunal system. Because of problems identified with the industrial tribunal system, the authors explore arbitration as an alternative form of dismissal dispute resolution.

[c] Mediation

An overview of mediation in industrial disputes was carried out by Ramsumair Singh. Singh examined the British experience of this form of third party intervention since the establishment of ACAS. He argued that where conciliation had failed and where arbitration was not acceptable to the parties, then mediation offered a flexible, interactive alternative. Although more costly than arbitration, Singh considered that the costs of a dispute could soon outweigh the costs of a mediation. Citing examples of the miners' strike 1984-85 and the water industry dispute in 1983, he concluded that there was scope for the development of mediation in dealing with particular types of industrial disputes[18].

ii] The literature on arbitration:

Before the present study, some work had already been conducted into ACAS arbitration in addition to the work of John Lockyer referred to above. Three pieces of work have been written by arbitrators on ACAS's current panel of arbitrators, that is by Harcourt Concannon, John Mulholland and Brian Towers. Arbitration was the subject of Concannon's doctoral thesis [1986] and of Mulholland's MSc dissertation [1974]; and of research conducted by Towers and Wright (1983 a and b).

Mulholland's work was completed before the establishment of ACAS and involved a comparative study of arbitration in Britain and America together with a survey of the opinions of some of those involved

in arbitration, that is of the Institute of Personnel Management [IPM] and trade union general secretaries. The conclusions of this survey were that, although arbitration was not a substitute for collective bargaining, both the IPM and trade unions representatives expressed the belief that arbitration had a greater role to play in industrial disputes.

Towers and Wright, in their research, were concerned to provide some insight into the practice of arbitration, with specific reference to the disclosure of informaion in general pay claims references. The authors made use of two case studies and a mailed questionnaire survey of ACAS arbitration. In part, because of the particular focus of their research, they did not obtain a high response and were restricted to analysing twenty-nine responses to their survey - a response rate of 29.6%. From their research, Towers and Wright concluded that industrial relations factors have more influence than ability-to-pay in pay reference arbitration cases. Further they note that, although the arbitrator had a good deal of freedom in the whole process, that this was constrained by customs, conventions and carefully designed terms of reference.

The objectives of Concannon's thesis were to review the process of voluntary arbitration, examine the policy debate concerning the distinction between arbitration and the work of industrial tribunals in disciplinary disputes, and to compare the themes and styles adopted for collective and individualised issues. The study examined the arbitration work of ACAS and concentrated on case study material for single arbitrations, particularly in relation to disciplinary issues, for the period 1972 to 1981. The study was also informed by the writer's own experience as an ACAS arbitrator since 1979.

Concannon's work provides a general overview of the different approaches to dispute settlement in industrial relations and the methods of third party intervention available. He then outlines the different types of arbitration and the historical framework in which voluntary arbitration developed before explaining in some detail the whole process involved. The second volume of the thesis provides an introduction to discussions surrounding arbitration awards. Finally, Concannon examines disciplinary references to arbitration in depth, comparing the arbitration approach to unfair dismissal to that of

industrial tribunals. Concannon's argument is that because of the criticisms of legalism often levelled at the industrial tribunal process, there are advantages and much more scope for the use of voluntary arbitration in dismissal and discipline cases than has been recognised previously.

In his thesis Concannon stresses that despite the long history of voluntary arbitration, the topic is relatively unresearched. Instead much of the useful literature arises out of incidental discussion of the topic is the course of work primarily concerned with broader questions of industrial relations and collective bargaining. Therefore, one of his central objectives is to analyse the nature of the processes involved in single arbitration and Concannon is successful in contributing to a better understanding of this area of study. Concannon also notes the lack of published material on the work of single arbitrators and he recommends a further exercise for future researchers based on interviews with arbitrators. In addition he notes the paucity of knowledge regarding how the parties themselves value the arbitration method and how arbitration awards work in practice.

The studies by Mulholland, Concannon and Towers and Wright contribute to knowledge of arbitration as one form of third party intervention, and as with the work of Lockyer [1979], are written by practitioners with an intimate knowledge of the whole process. However, in spite of brief references to the recruitment of arbitrators and the types of awards which come to arbitration, very little detailed information on these topics is available from these works. The survey of arbitrators conducted by Towers and Wright focussed on the disclosure of information in general pay claims cases. In addition, although Mulholland did carry out a survey of interested parties in arbitration, this was limited in scope and referred to a period before the existence of ACAS.

The result is that, as Concannon acknowledges, very little is known and has been written about the arbitrators, arbitration awards and the perceptions of the parties directly involved in arbitration. Tom Johnston has argued that arbitration in Britain has been ill-served by "the cloak of coyness and anonymity that has surrounded it."[19].

To a large extent the lack of research into the above aspects of arbitration are due to the confidential nature of the process and the fact that the awards are the property of the parties themselves and as such are not published. Further ACAS, in collaborating with the research project to which this thesis refers, have restricted access to the available data to the researcher involved. It should also be said that while ACAS was extremely interested in a profile of its arbitrators and an historical survey of the arbitration awards, there was some resistance to carrying out a follow-up study of the parties themselves. Partly this was due to a certain caution and fear that approaching the parties after they had learned to live with the results of the arbitration may rekindle elements of the dispute. However, after the survey of the advisory service [Armstrong and Lucas, 1985]; the conciliation service [Hiltrop, 1987]; and the surveys of arbitrators and their awards [Brown, 1985 and 1986], ACAS were persuaded that a survey of the parties to arbitration should also be conducted.

The surveys already conducted into the services offered by ACAS by the authors identified above are located mainly within debates concerning third party intervention and collective bargaining. None have attempted to locate their discussions within broader debates over the nature of the political process and more specifically the relationship between the state and organised interests in industrial relations.

THE OBJECTIVES AND APPROACH OF THIS STUDY

> "The process entails a continuing attempt to link empirical evidence on organized interests to broader theoretical positions regarding the state, power and democracy in contemporary liberal, capitalist democracies in such a manner that these relationships can be explained."
>
> [Williamson, 1989, p.221]

Building on the work which has already been conducted into arbitration, the objectives of this study are twofold. The first is to provide additional empirical evidence and case study material on the role of arbitrators, the nature of awards, and the parties to arbitration. And the second is to link the findings of these investigations to broader political discourses.

In meeting the first objective, a questionnaire survey of all arbitrators on ACAS's panel was conducted in 1984[20]; a survey of a one in ten sample of cases brought to arbitration for the period 1942 to 1985 was undertaken[21]; and a questionnaire survey of all the parties involved in references to ACAS single and boards of arbitration in 1988 was carried out[22]. The information and data provided adds to the body of knowledge on arbitration and should assist those researching into arbitration in the future.

The second object is to draw the literatures on corporatism and arbitration together. However, a major difficulty with the diverse nature of the literature on corporatism discussed above is in applying it to specific examples of relationships between the state, capital and labour. That is in identifying the key characteristics of corporatism, which as indicated do vary between different authors.

Other authors have already undertaken the task of using current debates in state theory and applying such discourses to a particular institution or interest group in society. For example Grant and Sargent's analysis of Business Interests [1987]; and Moore and Booth's examination of decision and

policy making in Scotland [1989]. These works have provided useful models for this project, although their applicability to arbitration and industrial relations is limited.

The work of Colin Crouch [in Grant 1985], which specifically relates to industrial relations, provides a useful starting point. Crouch classifies industrial relations systems in terms of corporatist theory and develops an industrial relations bargaining model consisting of four elements - contestation, pluralist bargaining, bargained corporatism and authoritarian corporatism. Under these elements the roles of representatives can range from the purely representative to the purely disciplinary.

The basis of Crouch's argument is that as the relationship between capital and labour is fundamentally unequal, the state adopts an active role in the management of the problems which can exist in that relationship. His four categories describe different forms which that relationship can take:

1. Contestation:

   Where the relationship between capital and labour is such that a change to the benefit of one party can only occur at the same time as a concomitant change to the disadvantage of the other - zero sum game. Therefore, there is contestation as neither party can be expected to give up their relative advantage voluntarily. Such a conflict relationship can imply costs for the parties involved.

Under contestation Crouch contends there is little specialised role required for representatives of labour. And because the expectations of the representatives and workers are broadly the same, then there is little need for discipline.

2. Pluralist Bargaining:

   Where capital and labour decide that in the long run they would stand to gain from decreasing conflict between them. To avoid mutually damaging action, rules are established for deciding how issues should be resolved and for recourse to conciliation and arbitration services. This may represent a constraint on the actions of the parties, but decreases the costs of conflict. The conflict then becomes institutionalised.

Under pluralist bargaining Crouch argues that the actors in proceedings are representatives alone, and procedures work only if the representatives are able to convince their members that the representatives' experience of the service is a better guide to the balance of power than any attempt by the members to play the matter out for themselves in 'real' conflict. Both parties, capital and labour, accept the long-term nature of the relationship between them, where neither side seeks to eliminate the other and where current negotiations are affected by potential future behaviour. This situation Crouch describes as a positive-sum game.

3. Bargained Corporatism:

Where capital and labour do not always follow the positive-sum approach. Representatives ask members to accept a known sacrifice in exchange for potential future gain. Under bargained corporatism the object is to realise common interest and the parties are constrained to restrict their pursuit of zero-sum game and expand their scope of interaction. It should not be assumed that bargained corporatism necessarily secures better gains for capital or labour than pluralism or even contestation, as the result will depend on the balance of power between the parties at particular times.

Crouch believes that a system of bargained corporatism is not assured of success but:

> "It remains possible for the net gains expected from conflict by either party to become greater than those from pursuit of the joint aims, making it rational for them to break loose from the strain towards conflict-avoidance that the above implies..... However, once such a system becomes established, it contains certain self-reinforcing elements. The dense nature of the web of exchanges eventually enables commitments to be traded over time in a complex way."
>
> [Crouch in Grant, 1985, p.75]

4. Authoritarian Corporatism:

As the next stage in what Crouch's describes as the "continuum of industrial relations systems", authoritarian corporatism can only exist if autonomous representative organisations are crushed.

In applying these models to Britain, Crouch argues that the British system experienced a brief corporatist phase of the social contract from 1974-79, but that since the election of the new

Conservative government in 1979, there has been a rejection of bargained corporatism and a move towards a more classical pluralism with the role of labour being reduced. Further, in support of its labour market policies, the government has been prepared to move towards contestation by pursuing policies designed to weaken union leadership and through abolition of established procedures for dispute resolution.

The evidence would tend to endorse Crouch's view that at the macro-economic level the government has excluded labour from any neo-corporatist exercises since it took office in 1979, although one could argue that it has been much more cautious in its approach at the meso and micro level of the economy. The paradox is that withdrawal of state intervention at one level may necessitate stronger levels of co-operation from trade unions at other levels. The role given to trade unions as equal partners in the tripartite Manpower Services Commission [now the Training Agency in England and Wales and part of Scottish Enterprise in Scotland], is one example where the government required the support of trade unions in the initial stages of its new training programmes for successful implementation of the schemes. When the official levels of unemployment, specifically youth unemployment, began to decline and the schemes were already well established, the government was more confident and felt able to reduce the role and influence of trade unions and increase the influence of employers when it restructured and finally abolished the MSC[23].

For a supposedly non-interventionist government, the present administration has been remarkably active in pursuing some of its objectives in the labour market [Brown and King, 1988]. Also attempts at withdrawal in some areas have been limited. In the case of ACAS, it can be argued that many of the elements of bargained corporatism described above still exist in the day-to-day functions of the service. With reference to the Swedish system of corporatism, Crouch contends that:

> "It is not easy to build up a dense network of relationships essential to the success of bargained corporatism, but once achieved, such a system is not likely to be dispensed with lightly, given that the costs of co-operation are often exceeded by those of conflict."
>
> [Crouch in Grant, 1985, p.88]

In relation to the arbitration service of ACAS, there has been little change in the process involved and the use of the service by certain industries and trade unions. It must be conceded, however, that the government has denied the right of access to arbitration to a large section of public sector employees.

My approach shall be, therefore, to examine the workings of the arbitration service of ACAS to ascertain whether there is a major change or consistency in the state's intervention in this form or dispute resolution, which at first sight appears to be a denial of the stated policy of market solutions; and to consider why the particular tripartite form established in the setting up of ACAS in 1974 has survived the Thatcher administrations. Second, to examine the extent to which the role given to employers and trade unions in this structure can be described as one of intervention, intermediation and incorporation as identified in the corporatist literature by Grant and Sargent [1987]; and whether the process of arbitration can be incorporated within the models of state theory applied to industrial relations by Crouch [1985]. Within this approach the role played by the civil servants who administer the service; the significance of the move to increasing professionalism and efficiency of the service; and the information flow between the parties, the civil servants and the state in the whole process shall also be assessed.

I shall begin by examining the establishment of ACAS and the hopes and aspirations of those involved in its formation; the development of the arbitration service especially the periods 1974-79 and post-1979; and the context within which these developments have taken place [Chapter 2]. Within this framework I shall analyse the recruitment and appointment of arbitrators [Chapter 3]; the arbitration process [Chapter 4]; arbitration awards from 1942 to 1985 [Chapter 5]; and the views of the parties involved in arbitration. Finally, I shall locate the evidence from the case studies of arbitration within the corporatist literature [Chapter 6] before reaching my final summary and conclusions.

Sources:

The sources employed in this thesis include literature surveys; examination of archival material and ACAS publications held at ACAS Head Office; interviews with ACAS staff and arbitrators; questionnaire surveys; and involvement in the day-to-day workings of ACAS over a one year period. ACAS participated in the research as part of a collaborative project arranged by Dr Roger Davidson, Department of Economic and Social History, University of Edinburgh and John Lambert, their Director of the Collective Conciliation and Arbitration Branch of ACAS. As part of the collaborative relationship, ACAS granted me access to their files; conciliation[24] and arbitration proceedings; arbitrators' seminars; and council meetings. ACAS also supported the questionnaire surveys and interviews as detailed.

Full details of the research sources are contained in the appropriate chapters, but can be summarised as follows. First, a questionnaire survey of the 94 arbitrators on ACAS's panel of arbitrators in 1984 was undertaken to ascertain background information on the age, education and experience of those people employed as arbitrators; specific information on their experience of arbitration cases; and their views on arbitration in general. The response rate to this survey was 77%. Second, a questionnaire survey of all the parties to arbitration in 1988 was conducted to ascertain their views of their most recent experience of arbitration and their general views of this form of third party intervention. Of the questionnaires issued, 203 were returned completed, a response rate of 91.0%. Third, a survey of arbitration awards for the period 1942-85 was carried out using a one in ten random sample of cases from single and boards of arbitration. This survey highlighted the types of issues coming to arbitration over the period; the parties involved; the changes and continuity in the whole process; and the results of the awards themselves.

In addition I attended a number of events organised by ACAS. They included a one-week ACAS induction course for advisors to work in the advisory service in 1983; a one-day ACAS induction course for new arbitrators led by Professor George Bain in 1983; attendance, participation and presentation of research papers at ACAS annual seminars for arbitrators in 1984, 1985, 1986, 1988 and 1989 and two ACAS Council meetings; sitting in during two arbitration hearings; observation of the negotiations in two conciliation cases; and attendance at a Railway Staff National Tribunal chaired by Lord McCarthy. Finally, I conducted interviews with arbitrators, ACAS arbitration and conciliation staff, and academics in the field. I also gained considerable knowledge and insight into the preocesses involved by working in ACAS Head office over a one year period, during 1983/84, alongside civil service staff in the arbitration section.

There are obvious limitations to the approach adopted in this study and had more time been available it would have been instructive to have conducted more in-depth interviews with key politicians and civil servants directly involved in policy making over the period. In contributing to this area of study, it is to be hoped that other work will follow on these under-researched topics.

In particular the use of questionnaire surveys is limited, not least because the questions which were acceptable and useful for ACAS's purposes are not necessary the ones which would be of most interest to the social scientist. Also as Concannon notes [1986] there are technical problems in obtaining reliable information form the postal questionnaire approach and it may be unsuitable in obtaining data on arbitrators' attitudes[25]. Nevertheless, they do provide valuable information on the profile of arbitrators involved and insights into the views and perceptions of the parties to arbitration. Further, the evidence has been supplemented by interviews; the experience of working alongside ACAS staff; attending courses, seminars and meetings; and having access to ACAS papers and publications.

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1 For discussion of the range and scope of legislation see, for example, H.A. Clegg [1979], The Changing System of Industrial Relations in Britain, Chapter 10; John McIlroy [1983], Trade Unions in Britain Today, Chapter 3; John MacInness (1987), Thatcherism at Work.

2 There is much debate in the literature as to the extent of the post-war consensus, ie. at what level it existed, over what range of policies, and in relation to different time periods. Indeed some authors, for example, Pimlott [1988], question the very existence of the concept. For a discussion of this issue see, *Contemporary Record* : 'The Post-war Consensus', [Summer, 1988]; 'The Decline of the Post-war Consensus', [Autumn, 1988]; 'Is the Post-war Consensus a Myth?', [Summer, 1989]; 'Adapting to the Post-war Consensus, [November, 1989]; 'Post-war Consensus', [April, 1990].

3 For a description of the events leading up to and constituting the winter of discontent, see *Contemporary Record*, 'Symposium: The Winter of Discontent', Autumn 1987, pp 34/43.

4 See, for example, statements made on behalf of the Institute of Directors.

5 Initially the government intended to reduce inflation through control of the money supply. The Medium Term Financial Strategy [MTFS] established monetary growth targets. The MTFS was effectively abandoned in the early 1980's. The government then shifted its attention to controlling inflation through management of interest rates.

6 See Figure 5.2, p.102 and Figure 6.1, p.114 in Moore and Booth, [1989].

7 For a discussion of the role of the law of value and class struggle in Marxist state theory see Ben Fine and Lawrence Harris, [1979], *Re-reading Capital.*

8 A full discussion of the debate between corporatism and pluralism can be found in Williamson [1989], Chapter 3.

9 Williamson [1989] outlines his general model of corporatism in Chapter 10. See in particular pp.223/224.

10 See, for example, Grant [1985] Introduction and Grant and Sargent [1987].

11 See, for example, Table 7.1 in Williamson [1989], p.150.

12 David Coates [1989] provides an example of such an approach. See especially Chapter 5, 'From Corporatism to the Crisis of Labour'.

13 Remarks made on television interviews by the former Secretary of State for Health, Kenneth Clarke, during the ambulance dispute in 1989/90 illustrate one example of this attitude. When asked why the government was not prepared to intervene more directly in the dispute, Mr. Clarke replied that they had no intentions of returning to the 'bad old days' of corporatism.

14 There is a distinction between collective and individual conciliation which can be summarised as follows. Collective Conciliation: Section 2 of the Employment Protection Act 1975 empowers ACAS to offer conciliation as a means of settling industrial disputes either at the request of one or more parties to the dispute or at its own initiative. The use of collective conciliation is voluntary. Individual Conciliation: there is a range of individual employment rights including equal pay, sex discrimination, the closed shop and unfair dismissal where ACAS has a statutory role in conciliating between the parties in cases brought under this legislation.

15 ACAS appoints arbitrators to serve either as a single arbitrator (single arbitration) or as a chairperson of a group (board of arbitration). The appointments are made on an ad hoc basis in response to a reference to arbitration. In addition the Service provides the secretariat and administrative support to arbitral bodies in the public sector, including the Railway Staff National Tribunal, the Post Office Arbitration and Mediation Tribunal and the Police Arbitration Tribunal. The Service may also suggest names of arbitrators to handle private arbitrations which are not arranged under the auspices of ACAS. See Chapter 3 for a detailed discussion of the selection and appointment of ACAS arbitrators.

16 A discussion of arbitration awards and their implementation is to be found in Chapter 5.

17 The concept of 'voluntarism' is discussed in Chapter 2.

18 It is interesting to note that the studies of the advisory, conciliation and mediation services of ACAS were all conducted by arbitrators on ACAS's panel of arbitration. Armstrong, Hiltrop and Singh were all arbitrators at the time of their studies, while Dickens was appointed at a later date.

19 Quoted in Lockyer, [1979].

20 See Appendix I for results of questionnaire survey, 1985.

21 See Appendix II for results of survey of arbitration awards, 1986.

22 See Appendix III for results of survey of parties to arbitration, 1989.

23 For a detailed account of the rise of the MSC see Caroline Benn and John Fairley, [1986] and Alice Brown and John Fairley, [1989].

24 It was originally envisaged that the conciliation service of ACAS would also be examined. However, objections from the civil service unions involved, especially to a survey of the civil servants who act as conciliators, prevented this. After working in ACAS's Head Office in London, however, individual conciliation officers did allow me to interview them and to observe negotiations in two cases.

25 Concannon [1986] notes an earlier attempt to conduct a questionnaire survey of arbitrators by the Industrial Relations Research Unit at Warwick University, and their failure to publish the results of this work.

CHAPTER 2

THE DEVELOPMENT OF ARBITRATION AND THE CONTEXT OF CHANGE

INTRODUCTION

The objectives of this chapter are to situate the use of arbitration and specifically developments post-1979 within a broader historical framework. Although this section will not represent a comprehensive survey of the period covered, some historical background is required in order to assess the extent to which more recent events can be interpreted as a marked departure from the past or part of a continuing process.

In undertaking such a historical survey of one particular aspect of the state's relations with organised interests, it is also necessary to have an overview of the policy context in which developments occurred. As will be observed the state has played an increasingly active role within British industrial relations post-1945; and contrary to expectations, the Conservative government post-1979 has been more active than previous governments in the area of labour market policy.

This chapter will, therefore, provide a brief historical overview of the history of arbitration and the state's approach to industrial relations policy.

SECTION I HISTORICAL DEVELOPMENT

> "The concept of arbitration was introduced into British industrial relations via the Cotton Arbitration Acts [1800, 1803, 1804 and 1813] and the Combination Act 1800 and involved the use of an arbitrator in place of the Justice of the Peace who could 'summon and examine on oath the parties and their witnesses and forthwith determine the matters in issue.'"
>
> [Owen-Smith, Frick and Griffiths, 1989, p.6]

As the above quotation would indicate the use of arbitration in the British system of industrial relations has a longer history than might be imagined. It is not the purpose of this chapter to provide a comprehensive account of the development of arbitration. The history of this development is well documented in other works [Amulree, 1929; Knoop, 1905; Rankin 1931; Sharp, 1950] and excellent overviews are to be found in other sources [Concannon, 1986; Mulholland, 1974; Owen-Smith, Frick and Griffiths, 1989]. What follows, therefore, is a brief account of the development of arbitration and its establishment as a voluntary process within the British system of industrial relations. Such a summary is necessary in order to place current developments and debates within their historical context.

Owen-Smith et al [1989] periodise third party intervention in Britain into five phases, namely pre 1824; 1824-1896; 1896-1913; 1914-1945; and 1945 onwards. In contrast to this historical approach, a thematic approach is taken by Mulholland [1974] who examines four main topics. The first is the failure of the statutory schemes of enforceable arbitration which operated throughout the nineteenth century; the second is the success of the voluntary measures in the joint boards for conciliation and arbitration which existed at the end of the nineteenth century; the third is the voluntary system of arbitration which originated in 1896 and which continued to exist in the twentieth century; and fourth is the compulsory system of arbitration which operated during the first and second world wars and the immediate post-1945 period.

There are, however, overlaps in these apparently diverse methods and both the historical and thematic approaches can be combined as follows.

i] Pre-1896 - attempts at statutory enforcement

As indicated above the concept of arbitration was introduced into British industrial relations via the Cotton Arbitration Acts. In the nineteenth century, as industry was organised predominantly on a domestic basis, disputes tended to be individual rather than collective; and local Justices of the Peace acted as agents in fixing district rates of payment for work [Sharp, 1950]. As the structure of industry changed and collective bargaining developed after the repeal of the Combination Acts in 1824, so too did the nature of third party intervention. An Arbitration Act was passed in 1824 which allowed for most of the disputes that arose between masters and workmen engaged in cotton manufacture, and for the settlement of a complaint by magistrates. Owen-Smith et al argue that this Act was not effective for a number of reasons:

> "firstly, the use of magistrates tended to suggest criminal proceedings; secondly, disputes had to be referred without knowing exactly who would arbitrate; thirdly, magistrates in manufacturing districts were suspect as they were usually manufacturers themselves; and finally, there was no protection from victimisation available to those who used the legislation."
>
> [Owen-Smith et al, 1989, p.7]

Therefore, suspicion over the level of legalism, lack of neutrality and alleged victimisation rendered the Act unworkable.

However, in the period following 1824 there was a shift in opinion in support of conciliation and arbitration, and voluntary arrangements began to develop. One example of such arrangements was the joint board for the hosiery trade of Nottingham established by A.S.Mundella in 1860 [Owen-Smith et al, 1989, p.8].

As industrial unrest increased in the 1860s a Royal Commission was appointed, to examine the problem and as a means of controlling the level of strikes, and introduced the Arbitration [Masters and Workmen] Bill. The Act which was passed in 1872 allowed for the designation of a "board, council, persons or person as arbitrators or arbitrator" in the event of disputes and provided that "a master and a workman shall become mutually bound by an agreement under this Act[1]. Again this attempt at compulsion was unsuccessful as only a few agreements were reached under the terms of the Act. Further it can be argued that this measure represented the last attempt by the state in Britain at settling industrial disputes by legal sanction. At the same time voluntary arrangements for conciliation and arbitration developed in certain industries such as coal, steel, iron, textiles and footwear.

ii] 1896-1913 - development of voluntarist arrangements

The Conciliation Act of 1896 removed all provision for compulsory arbitration from the statute book repealing the legislation of 1824, 1867 and 1872. The Act which was "to make better Provision for the Prevention and Settlement of Trade Disputes"[2] provided that the Board of Trade could exercise the power to inquire into the causes and circumstances of a dispute; take steps to bring the parties together with a view to amicable settlement of the difference; appoint a person or persons to act as conciliator or as a board of conciliators; and on the application of both parties to the difference, appoint an arbitrator [Owen-Smith et al, 1989, p.10].

It is in this period that the foundations of the present system of third party intervention were laid, and where the scope of the state's arbitration functions were established. As Owen-Smith et al [1989] record:

> "This legislation included most of the functions which are now carried out by ACAS - notably, arbitration, conciliation, inquiry and also the brief of encouraging collective bargaining to take place in a context of the existence of various types of voluntary industry-based joint negotiating committees. It is therefore at this point that we can note the birth of the present system of third party involvement in Britain in a general form."
>
> [Owen-Smith et al, 1989, p.10]

Therefore, in recognition that compulsory third party intervention had been unworkable in practice, a system of voluntary disputes machinery was established under the auspices of the state. State involvement in disputes was restricted to the role of 'agents of last resort', when all other means of dispute resolution had been exhausted. The 'last resort' principle has survived as an important factor in present practice[3].

iii] 1914-45 - war-time conditions and compulsory arbitration

The special conditions prevailing after the outbreak of the First World War led to the introduction and acceptance of compulsory arbitration and the temporary suspension of voluntarism in the form of the Munitions of War Act 1915. Initially the Act introduced a system of compulsory arbitration for munitions work, but the powers of the Act also allowed for its extension to other industries involved in the war effort. The Board of Trade [from 1916 the new Ministry of Labour] had powers to refer disputes to arbitration; awards were binding; and strikes and lockouts were illegal. During its enforcement [July 1915 to November 1918], 7,820 arbitration cases were dealt with, 3,746 of these by the Committee on Production [Mulholland, 1974, p.57].

However, in spite of the special conditions of war-time, the legislation did not gain total support. Strikes did continue to occur demonstrating the problem of enforcement of the statutory prohibition. This experience was to influence attitudes to compulsory arbitration in the future.

Adhering to the voluntary principle, one of the Whitley Committee's recommendations in 1916 was that a permanent Court of Arbitration should be established. This recommendation was effected by the Industrial Court Act 1919 which set up the Industrial Court [the forerunner of the Central Arbitration Committee] and allowed for the appointment of ad hoc Courts of Inquiry.

During the inter-war period, therefore, there was a return to the system of voluntary pay determination and, with the consent of both parties to a dispute, conciliation and arbitration were provided under the Conciliation Act 1896 and the Industrial Court Act 1919.

The outbreak of the Second World War again resulted in the introduction of compulsory arbitration to minimise industrial disruption and maximise war production. The Conditions of Employment and National Arbitration Orders [Order 1305] recommended compulsory arbitration; established the National Arbitration Tribunal [NAT][4]; prohibited strikes and lock-outs; and required employers to observe recognized terms and conditions of employment. The Order which came into force in July 1940 applied to the whole of British industry and was "the furthest extent to which compulsory arbitration [had] been imposed over industry in general in Great Britain" [Sharp, quoted in Mulholland, 1974, p.58].

Mulholland [1974] argues, however, that the provisions of the Order were not intended to replace the normal processes of collective bargaining but to provide a final stage in them and that voluntarism was still the basis of industrial relations. Also it should be noted that the imposition on workers to observe the restriction on strikes and subject their pay claims and other disputes to compulsory arbitration, was, to some extent, balanced by the prohibition on employers' ability to impose a lock-out and also the requirement to observe recognised conditions of employment in an industry. This latter condition was to prove an area of dispute in future years.

iv] Post-1945 - the continuation of compulsion

Unlike the period immediately following the First World War, compulsory arbitration continued after the war from 1945 to 1951 under Order 1305. Mulholland states that this was acceptable to both employers and unions because the voluntary machinery continued to operate successfully; the ban which the Order placed on all strikes and lockouts had no visible effect on the trends of unofficial strikes; and in any event enforcement of the law against large number of workers became impossible [1974, p.60]. In other words, Mulholland's contention is that the provisions of Order 1305 were maintained because they had little influence in practice.

Alan Bullock's biography of Ernest Bevin provides a different interpretation of the support from some union leaders for compulsory arbitration. Referring to the experience immediately after the 1914-18 war when unions had repudiated arbitration and had gone on strike for higher wages, Bevin argued that the real danger period for inflation was not war-time itself but the period immediately after the war was over. To avoid a repetition of this experience, Bevin argued for retaining and strengthening the compulsory arbitration procedure he established in June 1940 as a check on unions' demands and government policy. This he argued would be "the best guarantee against a runaway inflation when the war was over." [Bullock, 1960, p.90].

It is interesting to note these different perspectives on the attitudes of trade union leaders. It is feasible that both provide an accurate analysis, as there are many examples in industrial relations where trade union leaders differ in their interpretation of the best interests of their members.

In the event, Order 1305 was replaced in 1951 by the Industrial Disputes Order [Order 1376] which provided for reference to a new Industrial Disputes Tribunal [IDT] for arbitration at the request of one party only - a system which was to become known as unilateral arbitration. Thus, Mulholland argues that:

> "It was felt by the government, with the general support of both employers and unions, that arbitration containing some measures of legal enforceability still had a useful role to play in resolving industrial conflict."
>
> [Mulholland, 1974, p.61]

However, in recognition of the difficulty of banning strikes especially in the conditions of peacetime, the Order ended the prohibition of strikes and lockouts.

Order 1376 was eventually repealed in 1959 and, in spite of opposition from the trade union movement, the IDT was also abolished in 1958 after seven and a half years of operation in which it issued 1,270 awards on both local and national issues, one quarter of these in the public sector [Mullholland, 1974, pp.61/62]. The abolition of Order 1376 is attributed to the withdrawal of support by employers and indeed direct opposition of employers to the operation of unilateral access to arbitration.

> "Gradually employers became disenchanted with a system which they felt provided trade unions with the belt of industrial action and the braces of unilateral reference to arbitration."
>
> [Lowry, 1986, p.6]

The majority of references [approximately 95%] to the IDT were taken by the unions and the existence of this option for unions was interpreted as 'one sided' by many employers; also there were accusations that the Tribunal's awards were inflationary [Mulholland, 1974; Owen-Smith et al, 1989]. Mulholland quotes a spokesperson for the Conservative government commenting after the withdrawal of Order 1376 "that a system in which 'one party or another had to be coerced by law was out of keeping with the British system of industrial relations.'" [1974, p.63]

It is interesting to note this dissatisfaction with compulsion from employers at a time when there were relatively full employment and labour was in short supply; and to contrast it with calls from some employers and the Institute of Directors for compulsory arbitration in the 1980s when unemployment was high and there was an over-supply of labour. It would appear, therefore, that market conditions

and the balance of power in industrial relations at any particular time does influence employers' attitudes to third party intervention and the form it should take.

v] 1959 and after - return to voluntarism

> "State action as a third party in the post-war period in Britain derived its authority from four legislative measures the Conciliation Act 1896; Industrial Courts Act 1919; Wages Councils Act 1945 and Terms and Conditions of Employment Act 1959."
>
> [Owen-Smith et al, 1989, p.18]

Although the period post 1959 is generally accepted to represent a return to voluntarism, Lowry [1986] argues that it was not the end of compulsory arbitration as Section 8 of the Terms and Conditions of Employment Act of 1959 gave continued access to unilateral binding arbitration when an issue arose as to whether an employer was observing established or recognised terms and conditions for the trade or industry. However, during this period both the TUC and employers' organisations played an increasing role in industrial relations; and unions and employers in the private sector developed their own disputes procedures. Union membership increased and, after its formation in 1965, the Confederation of British Industry [CBI] became the major representative of employers. By 1960 almost all major industries were covered by national agreements which often included grievance procedures which provided for conciliation and arbitration. The private sector relied on the Department of Employment conciliation services for resolution of disputes and when there was failure to agree references were made to the Industrial Court or to a single or board of arbitrators on a voluntary basis.

The 1960s and early 1970s also witnessed an increased role for government in industrial relations. At the same time confidence in the government's impartiality and the independence of the service provided by the Department of Employment is considered to have declined. An example of this view is to be found in a statement by the CBI:

> "In recent times the trade unions became unwilling to use the conciliation and arbitration services made available by government because of the belief that they were biased in favour of whatever incomes policy the government of the day was seeking to impose. This phase became evident when in 1968 the Ministry of Labour became the Department of Employment and Productivity - the Ministry traditionally concerned with industrial relations had by this change also become involved in incomes policy."
>
> [CBI, 1975]

In addition, White [1985] records two examples of what he describes as strained impartiality in Britain in the 1970s. The first relates to the role of civil servants in the Department of Employment. As illustrated by the quotation above, it was contended that civil servants acting as conciliators in industrial disputes could not be impartial in their dealings with parties to a dispute when at the same time the government, their employer, was attempting to implement incomes policies. This fear was highlighted in 1972 when the Conservative government withheld conciliation facilities from disputes arising out of wage claims which threatened to breach the pay policy norms. The experience of the final years of the Commission on Industrial Relations [CIR] provides a second example of strained impartiality. When it was set up by the Labour government in 1969, the CIR was to assist and encourage the voluntary reform of industrial relations. After the change of government in 1970 and the proposed extension of the CIR's powers under the unpopular Industrial Relations Act 1971, the trade unions withdrew their support; and the CIR was wound up on Labour's return to office in 1974.

One result of the lack of confidence in the state's ability to intervene in third party disputes, was the joint attempt by the CBI and TUC to set up their own voluntary conciliation and arbitration service in 1972. As recorded by the CBI:

> "Believing that this attitude of non-cooperation could be overcome and industrial relations improved if there were available a service independent of government authority, the CBI and TUC signed an agreement in July 1972 for the creation of an independent conciliation and arbitration service."
>
> [CBI, March 1975]

It was anticipated that the service would operate from 1 September 1972 and that it would concentrate initially on disputes of major importance in which a stoppage of work had occurred or was apprehended:

> "Both parties agreed that collective bargaining is best brought to a satisfactory conclusion by voluntary means and that the widespread availability of independent conciliators and arbitrators can help considerably to promote and maintain industrial peace."
>
> [CBI, July 1972][5]

The new service heard its first arbitration case in January 1973 before two arbitrators, Mr D Flunder [Director, Dunlop Ltd] and Mr Will Paynter [former General Secretary of the National Union of Mineworkers]. Writing for *Personnel Management* prior to the hearing of this case, Will Paynter argued that the new Conciliation and Arbitration Service was set up because:

> "the conflict between the government's role as manager of the economy on the one hand, and as an agent for the promotion of industrial peace on the other, has undoubtedly weakened the confidence of the unions in the impartiality of government-provided conciliation and arbitration particularly in pay disputes."
>
> [Paynter, 1972, p.20]

He recognised, however, that particularly in times of high inflation and low economic growth, any agency will have difficulties in maintaining the confidence of both sides of industry and that such lack of confidence could also spill over to the concepts of conciliation and arbitration as a means of reconciling industrial differences. His fears proved to be well founded as the service was "virtually put into cold store by the arrival in November 1972 of a statutory pay policy" [CBI, 7 March 1975] and no further cases were heard.

Arguing that previous attempts to reform industrial relations had not recognised the limits of legal intervention, McCarthy and Ellis [1973] proposed a system whereby problems could be anticipated and solved by joint agreement. They recommended the extension of third party intervention; and the establishment of a range on independent agencies and a service free form government control but financed through public funds. Their proposals undoubtedly influenced future developments.

On its return to office in 1974. and after the issue of a Consultative Document, the Labour government set up its own independent third party service the Conciliation and Arbitration Service in 1974, to be known as the Advisory, Conciliation and Arbitration Service [ACAS] from January 1975 and established by statute in January 1976 under the Employment Protection Act 1975. Parliament gave ACAS three main tasks which are defined in Section 1 of the Employment Protection Act 1975: to promote the improvement of industrial relations; to encourage collective bargaining; and to develop and, where necessary, reform collective bargaining machinery [ACAS, February 1984; Mortimer, 1981 a][6]. The terms of reference of the service were to provide conciliation and mediation; to make facilities available for arbitration; to provide advisory services to industry on industrial relations; and to undertake investigations as a means of promoting the improvement and extension of collective bargaining. In his letter to the new Chairman of ACAS, Michael Foot, the Secretary of State for Employment, stated that:

> "It is of course essential to the concept that within these terms of reference the service should be, and be seen to be, independent and so attract and retain the co-operation and support of all sectors of employment. So far as the government is concerned, it will not seek to interfere in the activities of the Service."
>
> [Foot, 1974][7]

ACAS is separated from but administered by the Department of Employment, and was to derive its independent status from a Council which was to be responsible for the general conduct of the service and which was not to be subject to directions from any Minister of the Crown. The ten person Council is made up of a full-time Chairman and nine part-time members appointed by the Secretary of State for Employment. Three of the part-time members are nominated by the CBI, three by the TUC and the other three are independent members normally from the academic profession[8]. The staff of ACAS are civil servants, who are accountable to the Council's Chairman and not to the Secretary of State. In addition there exists a panel of independent persons who are called upon to arbitrate or mediate on an ad hoc basis. The first chairman of ACAS was Jim Mortimer[9], replaced in 1981 by Sir Pat Lowry[10] following the change in government, who was subsequently replaced in 1987 by the current Chairman Douglas Smith[11].

Commentators warned again of the pitfalls which could face ACAS, particularly if the government was concerned to check wage inflation. Interviewed by the *Daily Telegraph* in 1974, Mr Mortimer stated that the service was primarily not an economic instrument, but one of public policy in industrial relations, although he acknowledged that the two considerations overlapped somewhat. He was also cautious about the position of the service if a government imposed wage restraint[12].

White [1985] also draws attention to the limitations in the voluntarist and independent nature of ACAS. Although separate from the Department of Employment, ACAS is still a creature of the state:

> "It receives its funds from the Exchequer; it embodies a particular view of industrial relations; and it is infused with certain principles which could be said to have their limitations."
>
> [White, 1985, p.8]

He argues that examples of the particular view of industrial relations or the implicit principles employed are to be found in ACAS's analysis of the success of its operations; the pro-employer bias attributed to ACAS by some commentators; the experience of the orthodox approach to trade union recognition cases between 1976 to 1980 and the limitations of ACAS's power in enforcing recommendations; and the philosophy of encouragement of collective bargaining.

One of the examples cited by White has indeed received much attention and that is the provisions of Section ll of the 1975 Employment Protection Act. Under this section a trade union could unilaterally refer a recognition case to ACAS, although as stated ACAS had no statutory power to enforce its recommendations. This part of the legislation was opposed by employers and was subject to much controversy and media attention. One highly publicised example of such opposition is to be found in the Grunwick dispute[13]. Even those, like Jim Mortimer, who argued for statutory provision for the right to bargain collectively recognised that this objective was not satisfactorily achieved by the

provisions of the Act [Mortimer, 1981 b] Sections ll-16 of the 1975 Act were, therefore, repealed by the Conservative government in 1980.

During its early years of operation the use of arbitration under the auspices of ACAS did increase, peaking in 1978. The references to arbitration declined in the period after the election of the Conservative government in 1979 although the figures for 1989 show an increase over 1988. Different reasons can be given for this. First there may have been reluctance by some trade unions to use the service after the change of government; and second the rapid rise in unemployment immediately post-1979 did appear to impact on the level of industrial disputes and hence the number of references to arbitration. In more recent times the level of arbitration cases has again risen, although not to the figures for the peak years[14].

Summary

As has been outlined above the use of arbitration as one form of third party intervention has a long history in British industrial relations. Early attempts at statutory enforcement of the process failed to work in practice; and even during the special conditions of war-time, aspects of the compulsory legislation did not enjoy total support. The foundations for the present voluntary system of third party intervention are to be found in the Conciliation Act 1896. As will be evident from analysis carried out as part of this study, there is substantial support both for the use of arbitration itself and the continuation of the voluntarist principle amongst arbitrators and parties to arbitration. Further, these groups also consider the perceived independence and impartiality of the service to be an important issue[15]. This continuity of approach to arbitration will be discussed in the chapters which follow.

SECTION II THE CONTEXT OF CHANGE

> "The historical development of arbitration in Britain is not a subject which can meaningfully be considered in isolation; rather it should be examined as Professor Turner noted: 'In the contexts of the evolution of labour organisations and of state policy.'"
>
> [Mulholland, 1974, p.29]

Any examination of arbitration cannot be conducted out of context of the political and economic environment in which it is operating and more general attitudes towards industrial relations' policy. For example as was discussed above, compulsory arbitration was only acceptable in Britain, and even then not universally, under very specific, mainly war-time conditions. The establishment of ACAS, its constitution and remit can best be understood, therefore, in the context of other conditions. Further, in order to address the question of the survival of ACAS and its arbitration service in what could be described as a hostile political climate, some understanding of the policies of the present government and the impact of changing conditions and new legislation on labour organisations is required. This can best be presented by looking at different periods post 1945.

i] 1945-64 - post-war consensus and voluntarism

Before the end of the Second World War, a consensus was reached between all political parties in Britain that the maintenance of a 'high and stable level of employment' should be a common objective of post-war policy. That is, there was acceptance of responsibility in this area by future governments. The White Paper on Employment Policy 1944 listed four main methods of achieving this objective: [a] influencing the location of new enterprises in areas of high unemployment; [b] encouraging mobility between areas and occupations; [c] retraining of labour; and most importantly, [d] using government spending, taxation and monetary policy to keep aggregate demand or total spending at high enough levels to maintain employment [HMSO, 1944].

The belief that governments were both capable of and responsible for achieving high employment through greater intervention in the economy, marked a radical departure from orthodox economic theory which dictated the adherence to market forces and balanced budgets, and opposed the proposition that governments could affect the level of employment in an economy. However, the experience of the two world wars and the depression of the inter-war period, created a popular demand for and belief that government should and could take responsibility for the level of employment in an economy [Addison, 1975; Marwick, 1968]; a demand which gained credence from the intellectual support of the economist John Maynard Keynes and other economists, who attacked the weaknesses in orthodox economic theory. In contrast it was contended that governments could influence the level of employment by spending and stimulating demand if private investors were unwilling to do so. Basically if there is insufficient demand in an economy to maintain full employment, Keynes argued that governments could stimulate demand by increasing expenditure through deficit spending; and that such spending would increase economic activity through the 'multiplier' effect. The initial budget deficit used to stimulate the economy would then be offset by increased tax revenues[16].

The theories of Keynes in particular were to have a significant impact on the policies of post-war governments. Grahl [1983] discusses the 'revolutionary' nature of Keynes' analysis and the influence

of his ideas were to have particularly on the leaders of the labour movement in the Labour Party and TUC. Skidelsky [1979] argues that Keynes found an economic solution to a political and social problem and provided a relevant philosophy for capitalist democracy against its critics. Or as Kavanagh [1987] observes Keynes was a 'genius', because he showed politicians how to curb the risks and uncertainties of the market.

In the immediate post-war period British governments, both Labour and Conservative accepted the new economic orthodoxy of Keynesian demand management; intervened in the economy; and engaged in what has been described as consensus politics[17] [Kavanagh, 1987]. Any differences which did occur between the parties were limited to the extent of government intervention in the economy. Kavanagh outlines the main features of the consensus in terms of domestic policy as full employment budgets; greater acceptance of trade unions; public ownership of the basic or monopoly services and industries; state provision of social welfare, requiring high public expenditure and taxation; and an increased role for the state in economic management and a decreased role for the market [Kavanagh, 1987; Kavanagh and Morris, 1989].

In the 1950s and early 1960s, governments appeared to be very successful in maintaining a 'high and stable level of employment' and the 'normal' unemployment rate was generally accepted to be of the order of 2% [a figure somewhat less than the 6% which Keynes had anticipated]. It is less clear, however, whether this success was due to government demand management policies per se, or the favourable economic conditions of the post-war period [Tomlinson, 1985]. Inflation was also kept low in this period and governments believed that they could trade-off the unemployment and inflation rates, that is they believed they had a choice between unemployment or inflation [Grant and Nath, 1984; Trevithick, 1977][18]. Dearlove and Saunders [1984] cite four factors which help to explain the comparative economic success of this period, often described as the long boom. First, western countries enjoyed a supply of cheap imports and cheap immigrant labour; second, a stable world monetary system was established at Bretton Woods 1944 which enhanced world trade; third, new investment opportunities presented themselves partially as a by-product of the new techniques

developed during war-time; and fourth, the commitment by government to intervention along Keynesian lines. Tomlinson [1985] argues that the apparent success of governments led to a misunderstanding of the role which Keynesianism played in government economic policy, and an exaggeration of the capabilities of governments to deliver their stated policy objectives.

During this period of high employment and low inflation, the main emphasis was on macroeconomic policy management, and governments were less concerned with active labour market policy, although they did intervene through regional policies mainly as a response to regional unemployment. There also existed the 'voluntarist' tradition in British industrial relations, which holds that industrial relations works best when government intervenes least; and which endorses the principle of free collective bargaining, in which employers and employees are free to reach agreement on terms and conditions of employment with the minimum of state interference. White defines 'voluntarism' as:

> "a conscious decision on the part of the state not to interfere in industrial relations, in response to a specific preference amongst employers and the unions for autonomy in handling their affairs."
>
> [White, 1985, p.l]

As a consequence, while the state has been involved in the past in passing laws recognising the status of trade unions, establishing the rights of workers to strike and protecting unions from being sued, it did not interfere directly in the bargains struck between employers and workers, bargains which were deemed to be morally but not legally binding [Brown, 1988b][19]. The other area where the law did intervene and was permitted included the enforcement of certain safety and health standards for workers; the protection of some groups of workers, including women and young people under the age of eighteen, against long hours of work; and the provision of social security legislation covering unemployment and health insurance and pensions [Clegg, 1979]. This prompted Otto Kahn-Freund to comment in 1954 that there was perhaps no other major country in the world in which the law played a less significant role in shaping industrial relations than in Britain[20].

In conjunction with the lack of legislation in industrial relations and in keeping with one of the features of the post-war consensus, namely the acceptance of trade unions, Owen-Smith et al [1989] outline the increased role given by the government to the TUC over the period. Further they note the growth of trade union membership between 1948 and 1964 especially amongst white-collar workers, but argue that because of structural changes in British industry this did not match the increase in the size of the total employed population. However, by 1968 over 10 million workers, roughly 40 per cent of the total employed population, were trade union members and 90 per cent of these belonged to organisations affiliated to the TUC. An increased role was also given to the body representing a confederation of employers, and in 1965 the British Employers Confederation merged with two national trade associations to form the Confederation of British Industry [CBI]. The new body claimed to represent firms employing over 75 per cent of labour in private industry and transport[21]. As representative of the two key organised interest groups, the TUC and the CBI were to play a greater part in tripartite organisations and government macroeconomic policy discussions.

It is within this context that the pressure to abandon compulsory arbitration and unilateral access to arbitration can be assessed. Therefore, the decision to repeal compulsory arbitration and unilateral access to arbitration can be understood, not only because it was deemed to be inappropriate to peacetime conditions; but second, because it was considered to be out of step with the voluntarist tradition of British industrial relations, and the more consultative, co-operative relationship which was being fostered with the two sides of industry.

ii] 1964-74 - consensus and voluntarism under threat

During the late 1960s and early 1970s economic conditions deteriorated in Britain and governments faced the problem of rapidly increasing inflation and unemployment and relatively slow economic growth in compared to European competitors. At this time it can be argued that unemployment declined in relative importance in terms of policy objectives and the focus of attention then became the fight against inflation [Therborn, 1986][22]. Adhering to a cost-push analysis of inflation, governments in the period resorted to incomes policies in an attempt to manage the crisis, even when, as was the case with the Heath administration, they had specifically rejected incomes policy as a policy instrument [Grant and Nath, 1984; Glyn and Harrison, 1980].

Reasons, other than excessive wage demands, were given for the relative decline of the British economy. For example some believed that the lack of national planning as practiced in France was the cause of the economic decline[23]. Others blamed the 'British disease', that is the so-called strike proneness, low productivity and high absenteeism of the British worker and prevalence of inter-union disputes; and British workers were compared unfavourably with their German or Japanese counterparts[24]. Another major theory was that 'excessive expectations' and growth of the welfare state had put public expenditure under stress at a time when economic growth in the economy was insufficient to meet the demands made on it causing a fiscal crisis of the state[25]. Indeed, some argued that unless expectations [and in particular wage demands] were moderated, inflation would reach a level which would pose a threat to liberal democracy[26]. As governments sought solutions to the problem, they flirted unsuccessfully with economic planning; set up the Royal Commission on Trade Unions and Employers' Organisations [Donovan Commission] in 1965 to investigate the British system of industrial relations; introduced incomes policies; and attempted, without success, to curb public expenditure[27].

Focussing specifically on industrial relations policy as the main interest of this study, the Donovan Commission broadly supported the existing system of industrial relations in Britain, and Kavanagh argues that:

> "To the government's disappointment its report in 1968 was largely non-interventionist in its recommendations."
>
> [Kavanagh, 1987, p.49]

The Commission identified two systems in operation, the formal and informal. The formal related to written, industry wide agreements and control over pay; whereas the informal was represented by tacit, plant level bargaining, unofficial strikes and a powerful shop stewards' movement. Donovan's basic recommendation was that the government should attempt to formalise the informal system of industrial relations with the objective of controlling the level of wages and reducing the number of unofficial strikes. Taylor [1987] contends that the findings of the Commission did not meet with the approval of the Labour leadership who wanted to be able to legitimate more radical action to reform trade unions and to deal with unofficial strikes.

Nonetheless, breaking with the voluntarist tradition, the Labour government proposed legislation to reform industrial relations. In 1969, the White Paper, 'In Place of Strife' proposed legal sanctions against unofficial strikes and recommended the setting up of a Commission on Industrial Relations; conciliation pauses in unconstitutional strikes; and solutions for inter-union disputes. The Bill was abandoned by the government after it met with strong resistance from the trade union movement and the party in Parliament. This attempt at industrial relations reform is argued to have contributed to the defeat of the Labour government in 1970.

The incoming Conservative government headed by Edward Heath produced its own proposals for reform in the Industrial Relations Act 1971. The Act proposed a new framework of law to cover trade union behaviour. The government incorporated many of Donovan's recommendations in the Act, although it differed in its diagnosis of the causes and cures for unofficial strikes [Taylor, 1987]. It differed also in

that it broke with the traditional, voluntarist approach to industrial relations which was inherent in the Commission's Report:

> "The British system of industrial relations is based on voluntarily agreed rules which, as a matter of principle, are not enforced by law."[28]

The Act established the National Industrial Relations Court and trade unions were given inducements to register with the Register of Trade Unions and Employers' Associations; also a number of industrial relations activities were classified as 'unfair industrial practices' with legal remedies for those deemed to be unfairly treated. Taylor [1987] argues that the success of the Act depended on the willingness of unions to register; the willingness of employers to institute proceedings against unions and strike leaders; and the capacity of the new Court to enforce its decisions. After a campaign of opposition by the unions and an unsuccessful testing of the legislation in the 1972 dock dispute, the Act became inoperable when the TUC and individual trade unions refused to comply [Griffith, 1979].

These attempts at reform and intervention by both Labour and Conservative governments were interpreted as anti-union by the labour movement and as Kavanagh states:

> "The paradox was that the failure of the Wilson attempt to introduce legislation and the ineffectiveness and political and industrial costs of the Heath legislation only appeared to confirm the validity of the voluntarist case."
>
> [Kavanagh, 1987, p.53]

The Act proved to be so unpopular that the Labour Party promised to repeal it if they were re-elected at the next election. The defeat of the Industrial Relations Act and Labour's previous attempts at reform fuelled the belief that the law could not intervene in British industrial relations - a belief that was to be challenged very directly after 1979[29].

No alterations were made to the state's intervention in arbitration during this period as the function was still carried out by the Department of Employment. It is reasonable to speculate that had the Labour

or Conservative governments been successful in their attempts to introduce the law into industrial relations in the way proposed, then the system of voluntary arbitration would have come under stress. As has been discussed above, however, the system did come under severe stress because of the conflict of interest in managing an incomes policy and operating a supposedly 'neutral', conciliation and arbitration service. As successful operation of such a service is dependent on the consent of the two sides of industry, another solution to the problem had to be found.

iii] 1974-1979 - attempts at resolution: great expectations

The Labour Party was elected to office in 1974 after the defeat of Edward Heath's government in 1974. As part of its 'Social Contract' with the TUC [an agreement drawn up by the Liaison Committee, which comprised representatives of the unions, the NEC and PLP, embodied in the statement 'Economic Policy and the Cost of Living' in February 1973], the Labour leadership was, according to Jordan [1982], forced to adopt a programme for a fundamental and irreversible shift in the balance of power and wealth in favour of working people and their families. It proposed, and initially put into practice, measures such as the abolition of the Pay Board and compulsory wage restraint; a freeze on all rents; food subsidies; and increased pensions. In an attempt to improve its mandate, the Labour government called a second election in October 1974 and outlined its proposals for legislation to expand the comprehensive education system; phase out private practice from the National Health Service; extend workers' participation in industry; implement a development land tax; and establish Scottish and Welsh assemblies.

As part of the contract with the unions and in return for voluntary wage restraint, the Labour government repealed the controversial Industrial Relations Act and replaced it with the Trade Union and Labour Relations Act 1974; and put on the statute book a number of pieces of legislation which improved the rights of working people, including the Employment Protection Act 1975, the Health

and Safety at Work Act 1974, the Sex Discrimination Act 1975 and the Race Relations Act 1976 [Clegg, 1979; Crouch, 1977][30].

Clegg [1979] notes that several new agencies were established to interpret and administer the new employment rights, the most novel and important of them being ACAS. He argues that ACAS's origins can be traced back to the incomes policy of the previous Conservative government and their refusal to allow access to the conciliation service run by the Department of Employment in certain cases where it was clear that the settlement would contravene pay policy. As discussed in Section I of this chapter, this action led the TUC and CBI to attempt to establish their own independent machinery for dispute resolution. The decision by the new government in 1974 to set up an independent service to be run on a tripartite basis, and which combined all the different aspects of intervention [advisory, conciliation, mediation and arbitration] into one single agency, gained general support from the Congress and the Confederation. Other new agencies including the MSC and the Health and Safety Commission took over areas of responsibility from the Department of Employment; and the Equal Opportunities Commission and the Racial Equality Commission were established under the Sex Discrimination and Race Relations Acts [Clegg, 1979].

The government set up the Bullock Committee to investigate how industrial democracy could be extended by representatives of workers on boards of directors[31]. The committee was of a tripartite nature and comprised representatives from employers and the trade union movement and an equal number of academics. The proposal was dropped by Jim Callaghan, who succeeded Harold Wilson as Prime Minister in 1976, after the Committee lodged a split report. The Majority report was signed by the academics and trade union representatives; the Minority Report by the employers' representatives. The former proposed that representatives on the Board should be elected by trade unionists only; while the latter argued that the election of representatives should include all employees. It should be said also that the proposal was unpopular with British managers at the time and was perceived to be giving too much power and influence to trade unions[32].

The establishment of ACAS in conjunction with the increased rights given to workers marked a new development in the relationship between the Labour government and the labour movement; and Crouch argues that:

> "the unions regarded their commitments under the social contract as marking a significant new departure in their role in society."
>
> [Crouch, 1977, p.250]

It is this period which Crouch describes as the height of bargained corporatism in Britain. It appeared that having failed to reform industrial relations by legislation to curb trade union behaviour in the past, the government attempted a corporatist approach based on their bargain and special relationship with the trade unions.

But the Labour government continued to face problems of rising inflation and unemployment and low economic growth. The other side of the contract, wage restraint, had not proved to be successful from the government's point of view. As the pressure on inflation mounted, the TUC began to accept that pay increases could be a factor in inflation [Crouch, 1977]. The government finally introduced a policy of pay restraint in 1975 [described as a Social Contract and not an Incomes Policy] with the threat of statutory control if the stated guidelines were ignored. Initially trade union leaders, and especially Jack Jones, leader of the TGWU, gave their support to the government's policy. At this time it is argued that the government withdrew from most of the radical policies contained in its manifesto. As the economic crisis worsened, interest rates were raised; targets for control of the money supply were introduced; and cuts in public expenditure were made through cash limits. This action was severely criticised by those on the left as an abandonment of the post-war commitment to full employment and an adoption of monetarist policies:

> "In 1975, under a Labour government, Keynesianism in Britain had its funeral."
>
> [Hodgson, 1981]

When the government tightened the terms of the Social Contract, unions resisted the attempt to impose a 5% limit on wage increases in 1978, and industrial unrest increased, leading to the so-called 'winter of discontent'. While the number of conciliation arbitration cases coming to ACAS in this period increased, the agency was unable to stem the increasing demands made on the government[33]. In response to industrial pressure from unions in the private and public sectors, the government modified its 5% policy and accepted the principle of pay comparability in January 1979. At the beginning of March, Professor Hugh Clegg was appointed to head a new standing commission on pay comparability, but by the end of March the House of Commons passed a motion of No Confidence in the Government, resulting in a general election in May of 1979.

At this time support grew for what Burkitt describes as the 'over mighty subject' thesis [Burkitt, 1981]. The basis of this thesis is that trade unions had abused the privileges they enjoyed under the 1906 and 1913 Acts, that their strength was used to the detriment of the economy and the national interest, and that the balance of power in industrial society now favoured the trade unions. Burkitt argues that proponents of the view that trade unions had become too powerful in British society failed to address the crucial questions of power to do what and power in relation to whom? If these questions are addressed then rather simplistic conclusions on the so-called power if trade unions can be avoided. Nevertheless commentators such as Hayek argue that the trade unions had "become the biggest obstacle to raising the living standards of the working class as a whole" [Hayek, 1978]. The main criticisms levied at trade unions were that they were too strong and militant; had too much influence on government policy; were undemocratic; above the law; and indulged in unpopular secondary action and picketing. It was contended by the opposition that the Labour government of 1974-1979 had heaped privilege without responsibility on the trade unions.

Such criticisms were supported by public opinion polls and even by some trade union members. It should be noted, however, that in spite of their general views on trade union activity, members thought that their own union did a good job[34]. The opposition Conservative Party capitalised on the

anti-trade union feeling during the election campaign and also highlighted public discontent with the events of the previous winter.

Again the Labour Party's somewhat stormy relationship with the trade unions is argued to have been a major contributory factor in the defeat of the party at the general election in 1979.

iv] 1979-1989 - smashing the consensus

The election of the first Thatcher government in 1979, in rhetoric at least, marked a radical departure from the post-war consensus[35]. The government offered the British people a 'new beginning', and, influenced by the philosophy of the 'New Right'[36], attempted to distance themselves further from responsibility for maintaining a 'high and stable level of employment' associated with the post-war Keynesian consensus. In 1945 government intervention and demand management were deemed to have saved the capitalist market system. But by 1979 such government activities were argued to be the source of the economic crisis in the system. The priorities were now explicitly stated to be the defeat of inflation by monetary policy; a withdrawal of government intervention and a return to market forces; and strengthening of the supply side of the economy [HMSO, 1979].

The government's approach to supply side reform, is not clearly stated in the 1985 White Paper on Employment where four main areas of labour market reform were identified, namely 'Quality' [which includes education and training reforms; 'Costs and Incentives' [including downward pressure on wages and decrease in taxation and benefits]; 'Flexibility' [which refers to trade union legislation and attempts to change attitudes and working practices; and 'Freedom' [which relates to deregulation, and the reform of Wages Councils and health and safety and employment protection] [Brown, 1988a and b; Department of Employment, 1985]. For a supposedly non-interventionist government, the Thatcher administrations have proved to be extremely active in the labour market [Brown and King, 1988; Robertson, 1986]. A major plank of this activity was the government's intention to reform industrial

relations and change the balance of power in favour of employers. Learning from the experience of previous administrations and especially the experience of Heath's Industrial Relations Act, the new government took a step-by-step or incremental approach to reform, and was cautious in timing the implementation of its legislation.

The government's trade union reform can be divided into three stages. The first is outlined in the 1979 manifesto which proposed three changes regarding picketing, the closed shop and wider participation. The main proposals for change were included in the 1980 Employment Act. This Act banned secondary picketing; limited the scope of the closed shop and promoted the use of secret ballots. The 1982 Employment Act extended the legislation by making trade unions liable to be sued if they organised unlawful industrial action; restricted the definition of a lawful trade dispute; extended legislation on the closed shop; and outlawed requirements in commercial contracts concerning trade union membership or recognition.

Stage two of the government's strategy was set out in the 1983 manifesto which proposed to "give union members control over their own unions" by holding ballots for the election of governing bodies of trade unions and deciding whether their unions should have party political funds. It proposed three changes regarding the political levy, essential services and involving employees. The main proposals were included in the 1984 Trade Union Act which introduced secret ballots for official strikes, the election of union executives and the maintenance of political funds. No attempts was made, however, at this stage to ban strikes in 'essential services', although civil servants were instructed to draft potential legislation[37].

Finally the 1987 manifesto proposed the next stage of legislation in relation to secret ballots for strikes; disciplinary action against union members; election of trade union governing bodies; and further legislation on the closed shop. Taylor [1987] argues that if all these reforms are passed the unions will have the weakest legal protection since before the 1906 Trades Disputes Act. Nevertheless

the government proceeded with its policy and the main proposals in the manifesto were included in the Employment Acts 1988 and 1989[38].

As might be anticipated, the impact of the government's industrial relations and labour market reforms, are subject to different interpretations[39]. A useful approach is provided by Longstreth [1988] who categorises the literature into three main groups.

First, Longstreth states there are those who argue that there has been a 'roll back' of union power and shopfloor strength as a central result of Conservative industrial relations and labour market policies; and that employers are now on the offensive and adopting a more 'macho' style of management. Evidence of this is to be found in the decrease in strikes and decline in trade union membership. In turn, this has been met with division and disarray in the trade union movement and attempts to adapt to changing conditions through a 'New Realism' approach.

The second approach identified by Longstreth is critical of the above analysis on the grounds that it is premature, based on a misinterpretation of strike levels and union membership and relies too heavily on newspaper headlines. Instead, it is argued that on the basis of empirical studies of workplace surveys which have been conducted, there is a remarkable degree of resilience in union organisation, collective bargaining is still a significant feature of industrial relations and the influence of shop stewards has not been eroded. This group do not deny the impact of the recession on the trade unions, but stress the continuity of bargaining relationships and the pragmatic adaptation of the union movement to changed conditions. Some contend that the government's legislation has, in many respects, worked to the advantage of the movement as a whole. For example, the number of strike ballots which have gone in favour of holding a strike; the number of unions who have retained or even introduced the political levy; and the involvement of other groups of workers, including the more active participation of women, in trade union activities.

The third approach, which Longstreth himself supports, attempts to reconcile the evidence above with wider social and economic trends, for example part-time and temporary work and increased pay differentials. The argument here is that there has been an increased dualism or segmentation in the labour market with an insulated core benefiting from the new conditions at the expense of an exposed secondary or periphery sector of the economy. Although Longstreth is attracted to this line of argument, he states that he finds the notion of dualism discussed by Goldthorpe [1984] difficult and problematic and, as yet, not fully worked out as a theoretical model[40].

What is evident from the above discussion is that attempts to analyse the impact of government's policies on trade unions either in terms of 'the union have been defeated' or 'the unions have been strengthened' theses are problematic. Also it is crucial to separate the government's own rhetoric in relation to trade union reform from the reality of industrial relations practice[41]. As Robert Taylor has argued:

> "The complex impact of Thatcherism on the unions does not warrant sweeping conclusions."
>
> [Taylor, 1987, p.21]

Summary

The above section traces the broader economic and political context of state policy within which arbitration has operated. The period of the Keynesian consensus in the post-war era has been outlined and the apparent break with the consensus in the late 1970s. The unsuccessful attempts by the state to reform industrial relations in the 1960s and 1970s has also been discussed. Finally the impact of the Thatcher governments' approach to industrial relations and labour market reform has been assessed.

The significance of the debate for this thesis is the extent to which the government's approach impacts on the role and work ACAS and in particular on its arbitration service. It also raises the question of why the present government has decided, at least until now, to leave the work of ACAS largely intact, while at the same time it has intervened so directly in other areas of the labour market and industrial relations. The continuation of arbitration within the context of the changing relationship between the state and organised labour will be discussed in the chapters which follow.

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1 Quote from the Arbitration Masters and Workmen Act 1872.

2 Quote from the Conciliation Act 1896.

3 As will be discussed below, evidence from the surveys carried out in this research indicates that, the principle of the use of arbitration as the 'last resort' or final stage in dispute resolution still commands the support of most civil servants, arbitrators and parties in industrial disputes.

4 It is estimated that 1,000 awards were issued by the National Arbitration Tribunal between August 1940 and October 1947, see Owen-Smith et al, 1989.

5 The full text of the CBI/TUC agreement on independent conciliation and arbitration is reproduced in the CBI Industrial Relations Bulletin, 15 August, 1972, No.8; and a list of the jointly nominated members of the panel of independent conciliators and arbitrators appears in the CBI Industrial Relations Bulletin, 29 September, 1972, No.9.

6 The Employment Protection Act 1975 repealed the Terms and Conditions of Employment Act 1959 and replaced the provision in this act for access to unilateral binding arbitration by Schedule ll which extended the scope of this type of arbitration to include claims based on the general level of terms and conditions. These cases were heard by the Central Arbitration Committee [CAC] which began to function in February 1976. The CAC is a standing body which replaced the Industrial Arbitration Boards [previously Industrial Courts] dating from the 1919 Industrial Court Act.

7 A summary of the letter dated 8 August 1974 from Michael Foot, Secretary of State for Employment, to Jim Mortimer, first Chairman of the newly established ACAS, can be found in the ACAS Annual Report 1975, Appendix B, pp.42/44.

8 The first trade union nominees were Mr Richard Briginshaw, General Secretary of the National Society of Operative Printers, Graphical and Media Personnel; Mr Jack Jones, General Secretary of the Transport and General Workers Union; and Mr George Smith, General Secretary of the Construction Union. The CBI nominated Mr Herbert Farrimond, Industrial Relations member of the British Railways Board; Mr George Peers, Industrial Relations Director of the Engineering Employers Federation; and the CBI's own Deputy Director General for Industrial Relations, Mr Thomas Swinden. The independent group included Professor Hugh Clegg, Professor of Industrial Relations at Warwick University; Professor Laurence Hunter, Professor of Applied Economics at Glasgow University; and Professor John Wood, Edward Bramley Professor of Law at Sheffield University. The first Chairman was Mr James Mortimer, industrial relations member of the London Transport Executive and former union official.

9 See ACAS Annual Report, 1975.

10 See ACAS Annual Report, 1982.

11 See ACAS Annual Report, 1986.

12 Interview of Jim Mortimer, the first Chairman of ACAS, in the *Daily Telegraph*, 26 August 1974.

13 For a discussion of the controversy surrounding the Grunwick dispute see Crouch, 1979.

14 See TABLE 1.1 in Chapter 1 for number of arbitration cases conducted by ACAS.

15 See in particular attitudes of arbitrators [Appendix I] and attitudes of parties to arbitration [Appendix III].

16 For a discussion of the influence of Keynsian economic theory on post-war government policy see Grant and Nath, [1984] and Brown, [1988b].

17 There is considerable debate about how real or imagined the consensus was in post-war Britain - see discussion in *Contemporary Record*, referred to in footnote 2, Chapter 1, for a summary of the debate. There is also debate amongst those who adhere to the consensus thesis, about the extent of the consensus. For example, Kavanagh [1987] and Grahl [1983] argue that the consensus was of an elite nature and as such did not necessarily reflect popular attitudes or enjoy public support.

18 See Trevithick, 1977 for a discussion of Phillips Curve analysis and the critique by Milton Friedman.

19 The main legislation referred are the Trade Union Acts of 1824, 1825 and 1871, the Trade Union Amendment Act of 1876, the Trade Disputes Act of 1906 and the Trade Union Act of 1911, which established the rights of workers to combine and to strike in furtherance of their demands; provided that unions could not be sued for an alleged wrongful act committed by the union or on its behalf; and which gave the trade unions the right to include in their constitution, clauses which authorised the spending of money for purposes set out in the constitution, for example political contributions.

20 Quoted in Clegg, 1979, p.290.

21 See Owen-Smith et al, 1989, pp.14/15.

22 Therborn dates the abandonment of full employment as the priority of objective of government policy to a statement made by Harold Wilson in 1964. Other authors date the shift in policy to later in the period or to James Callaghan's oft quoted statement to the 1976 Labour Party Conference when he argued that: "We used to think you could spend your way out of recession, and increase employment by cutting taxes and boosting government spending. I tell you in all candour that that option no longer exists, and that in so far as it ever did exist, it only worked on each occasion since the war by injecting a bigger dose of inflation into the economy followed by a higher level of unemployment as the next step."

Kenneth Harris [1989] has argued that "It was Callaghan who in 1976 pronounced the death of the cosy world of Keynes and ushered in the harsh winds of Thatcherism."

Other commentators consider the election of the first Thatcher government in 1979 as the key shift in policy away from a commitment to 'full employment'.

23 See the discussion of the debate surrounding economic planning in Budd, 1978.

24 See Hyman, 1972 for an analysis of strikes and the industrial relations journals in the period for discussion of the 'British disease' and comparisons with European workers.

25 See, for example, discussion in O'Conner, 1973.

26 One particular example of this argument can be found in the work of Samual Brittan, 1975.

27 There are many other competing theories for Britain's relative economic decline which are outside the scope of this thesis. They include Britain's attempt to hold on to her role as a world power; the dominance of financial capital; the lack of incentives for private industry; the banking system; poor management; sociological and cultural factors; and Britain's two-party political system. Another approach is to examine the period from the perspective of constraint theory - see Grant and Nath, 1984.

28 Section of Donovan Commission Report quoted in Kavanagh, 1987, p.53.

29 See quote from Conservative Manifesto 1979 in Chapter 1 where it is stated explicitly that the law would be used in the future to reform industrial relations.

30 The legislation also addressed issues of equal pay, maternity rights and pensions.

31 The lack of industrial democracy in Britain was often cited to be one reason for industrial unrest and economic decline.

32 The government eventually published a White Paper in 1978 including items from both reports, but the recommendations were not implemented in any significant manner.

33 See chronology of events from July 1975 to 3 May 1979 in *Contemporary Record*, Autumn 1987, pp.38/39.

34 See, for example, discussion in MacInnes, 1987, p.44.

35 As in the case of the post-war consensus, there is considerable debate as to the extent of policy changes or continuity of policy post-1979. One approach is to interpret the industrial relations policies of the Thatcher administration as a radical departure for the post-war consensus - for example, Mitchell [1987] contends that Thatcherism has been successful in banishing the spectre of union might which haunted past governments. In contrast, although McBride [1986] acknowledges the distinctive features in Thatcher's approach, he argues that the roots of change go back to government policy in the 1960's. Therefore he considers there is continuity of policy and not a radical departure from the recent past.

36 For a discussion of the influence of the 'New Right' on government policy see Bosanquet, 1983 and King, 1987.

37 To date this proposal has not been carried out by the government.

38 In December 1989, just before the publication of the Employment Bill, the Labour Party announced its own intention to withdraw support for the closed shop, arguing that such an action is now conducive and in line with the terms laid down in the European Social Charter.

39 This debate is linked with the debates surrounding the radicalism of the approach to industrial relations post-1979 - see footnote 35 above.

40 See discussion of Goldthorpe's concept of dualism in Chapter 1 above.

41 Different interpretations are to be found in Mitchell, 1987; McBride, 1986; MacInnes, 1987; Coates, 1989; Roberts, 1989; and Crouch, 1990.

PART II

EVIDENCE

CHAPTER 3

THE ARBITRATORS: THE UNKNOWN MEN AND WOMEN

INTRODUCTION

The objectives of this chapter are to provide some insight into the background and views of ACAS arbitrators [arbiters in Scotland]; the social politics of their selection; and an assessment of the role played by arbitrators as perceived by the parties to arbitration. The extent to which the selection and role of arbitrators has changed over time will also be examined.

Arbitrators necessarily play a key role in the process of arbitration. Yet very little is known about the arbitrators appointed by ACAS to conduct arbitration hearings, other than that they are not civil servants or employees of ACAS. There is often a direct or at least an implied criticism, from those who are not fully acquainted with the workings of voluntary arbitration in Britain, that the job is mainly undertaken by academics or lawyers who are ill-suited to the task because they lack the necessary industrial or commercial experience. Government Ministers are not exempt from perpetuating this view. In response to the request for arbitration by the trade union side during the 1989/90 ambulance dispute, the then Secretary of State for Health, Kenneth Clarke, argued that such a reference to arbitration through ACAS had no point since all it would mean was that some Professor would arrive at a decision. The implied criticism from Mr Clarke is that a university Professor would be out of touch with the realities of conditions in the labour market and with public expenditure constraints; and that third party dispute resolution was of little value. As Rideout argues:

> "Thus he managed, in a single sentence, sneers at the academic world and at industrial relations support machinery, neither of which are great favourites of this government."
>
> [Rideout, 1990, p.10]

It is difficult for the researcher to evaluate direct or indirect criticisms of arbitrators as the identity and background of most arbitrators is unknown. Even when industrial disputes which have been referred to arbitration are reported in the media, it is unusual for the arbitrator in question to be named. There is reluctance to include the arbitrator in the public discussion of the case and every effort it made to protect his or her integrity and anonymity, although there are exceptions to this in major disputes. One of the reasons for this is no doubt to protect the arbitrator and to avoid prejudicing his or her role in future arbitration cases[1]. Having said this, the identity and experience of some arbitrators does become known to the parties to arbitration; and some parties actually prefer to have the same arbitrator should they require the services of ACAS in subsequent cases. Conversely, after an unfavourable judgement, some or both parties may reject a particular arbitrator in any future reference.

In order to shed more light on the background of arbitrators, how they were selected and their views of arbitration, ACAS agreed to a questionnaire survey of all the arbitrators on their panel of arbitrators as at May 1984. Further information on the process of selection and the appointment of particular arbitrators to disputes was obtained from interviews with ACAS staff. A questionnaire survey of employers and trade unions who used the service in 1988 was also carried out, so that their perceptions and views of arbitrators and the arbitration service could be ascertained. Given the lack of research and available publised data on these issues[2], these surveys provide the first opportunity for an in-depth investigation of arbitration and original material on which future research can be based[3]. The findings of these surveys are discussed in Section II of this chapter.

Of interest to this study is a comparison of current and past practice. It is necessary, therefore, to examine briefly the historical evidence available on arbitrators and their appointment. It is clear from

a study of the literature that the problem of selecting a person with what are accepted to be the appropriate background, skills and qualifications for an arbitrator is one which has been the subject of discussion throughout the history of arbitration. As will be evident in the analysis of the views of the parties to arbitration in 1988, it is a question which has still not been resolved to the entire satisfaction of all those involved.

SECTION I ARBITRATORS AND THEIR APPOINTMENT: THE HISTORY

i] Pre-1945

As was discussed above [Chapter 2] the use of Justices of the Peace in the first half of the nineteenth century was deemed to introduce too much legalism into dispute resolution; and their knowledge of industrial relations issues was questioned [Lockyer, 1979]. Amulree records the shift in practice, following the introduction of the 1896 Conciliation Act, regarding the appointment of arbitrators:

> "In the early years under the Conciliation Act 1896, the Government and parties were fortunate in obtaining the services as Arbitrators of men of sound sense and good judgement, and there was less disposition to rely upon exalted rank and high sounding titles."
>
> [Amulree, 1929, p.112]

Although Amulree notes the shift away from the appointment of people with rank and titles, he does not identify the backgrounds of new arbitrators or methods of their selection. Also the whole concept of what was deemed to be 'sound sense and good judgement' is not clarified.

There is another related issue to the appointment of arbitrators and that is the importance of the relationship of arbitration selection to what the actual function of arbitration is itself perceived to be. In other words, one's perception of the function of arbitration may impact on the criteria for selecting an arbitrator. To illustrate the point, Davidson [1979], in recording the fact that the enforcement of the Conciliation Act was entrusted to the Board of Trade rather than the Home Office, argues that:

> "The problem of industrial unrest was viewed by late Victorian administrators as primarily one of economic dislocation rather than of law and order. It was therefore more logical that the Board should assume responsibility for dealing with it."
>
> [Davidson, 1979, p.176]

Davidson states that the Board of Trade was successful in resisting proposals for compulsory arbitration and the consensus of expert opinion at the time favoured a voluntarist approach to dispute resolution. As a result the 1896 Conciliation Act was extremely modest with no provision for a compulsory cooling-off period. Instead the Act provided that state arbitration could only be initiated by the voluntary submission of both parties to a dispute and that arbitration awards were not legally binding. However, the trade union movement was suspicious of the Act and the Board's role in its implementation, as they were disillusioned with the system of wage arbitrations operating in many sectors of British industry and with the Board's handling of industrial disputes since 1893. As Davidson points out their disillusion was based on the fact that:

> "The majority of umpires were from the professional or upper classes. They tended to adhere to the conventional view of political economy, to make their awards in line with short-run changes in the level of economic activity or with the selling price of the product involved, and to pay little regard to the standard of living of the working classes. As a result, during the depression in industrial prices between 1873 and 1896, the bulk of arbitration awards had given wage reductions."
>
> [Davidson, 1979, p.178]

In contrast some employers were concerned about the appointment of state arbitrators whom they feared would be influenced more by socialistic idealism than by the dictates of the market [Davidson, 1979, p.179]. In the event, employers need not have worried. Recognising that the support of industrialists was essential if state arbitration was to succeed, Davidson argues that the Board carefully selected umpires who were almost entirely from among the professional and upper classes and whose economic orthodoxy could be relied upon [ibid, p.185].

Given these circumstances, one may have expected the withdrawal of co-operation by the trade union movement. But, as Davidson contends, this did not happen, because, in spite of socialist rhetoric,

most labour negotiators were content to bargain in market terms of relativities and comparability. Second, although social bias in the appointment of umpires existed, the Board laid greater emphasis on the expertise of its umpires; it reduced the role of employers; and lastly confidence in the system developed especially because of the success of George Askwith as an industrial negotiator.

Davidson details the occupational background of state arbitrators, comparing these with the use of arbitrators in private, domestic dispute procedures [see Table 3.1].

TABLE 3.1

Occupational Background of Arbitrators

Occupation	% of arbitrators in private procedures [1]	% of arbitrators in state procedures [2]
Lawyer	48	32
Civil servant [administrator]	5	14
Civil servant [specialist]	-	20
National politician	10	5
Local politician	10	6
Architect/Surveyor	-	8
Employer	19	6
Trade Unionist	5	7
Academic	-	2
Ecclesiastic	3	-

[1] 1865-1914
[2] 1896-1914

Source: Davidson, 1979, p.186.

The above Table highlights the difference between the backgrounds of the private and state arbitrators and the less significant role given to lawyers in the state machinery and the higher representation of those from the industrial professions or with specialist scientific and industrial expertise in the civil service. Davidson notes, however, that the degree of commercial expertise possessed by lawyers who acted as state arbitrators is understated because lawyers were often selected by the Labour Department as much for their specialised knowledge of particular trades as for their professional status [Davidson, 1979, p.187].

Apart from the social background and experience of the arbitrators, another major problem discussed in the literature was the selection of a third party acceptable to both parties to a dispute to the extent that he or she was perceived to be independent from government and impartial or unbiased in his or her affiliations to either side. A related issue, which can conflict with the objective of impartiality, is the view held by some that the third party should also have experience of industrial relations and in some cases experience of a particular industry which is the subject of the dispute. Writing at the beginning of the century, Knoop outlines the problem as follows:

> "The first serious difficulty of arbitration is the choice of an arbitrator, and it is a double one. Should he, or should he not, be connected with the trade? and should he be a permanent officer, or be chosen to decide a particular case? ... It is absolutely essential that both parties to an arbitration should consider the umpire quite impartial and free from bias. At the same time, it is very desirable, if the arbitrator is to understand properly the case before him, without the arguments and discussion being unduly extended, that he should have at least some knowledge of industry in general, if not of the particular trade in which the case has occurred."
>
> [Knoop, 1905, p.29]

In noting the potential conflict between impartiality and experience, Knoop argues that this could be overcome by appointing gentlemen from a particular class background:

> "The ideal arbitrator is an unbiased man connected with industry, but unfortunately it is not always possible to find such a man, who is acceptable to both parties, and then it becomes necessary to choose some one unconnected with the trade, against whom no possible imputation of bias can be made. As far as England is concerned, members of this latter class have often been as successful arbitrators as members of the former; the late Judge Kettle, Lord Brassey and Lord James of Hereford, all gentlemen practically not connected with mining or manufacturing, have been no less successful as arbitrators than the late Rt. Hon. A.J. Mundella, the Rt. Hon. J. Chamberlain and Sir David Dale, Bart., who are, or were, closely connected with some industry. It will be noticed that all the gentlemen mentioned above are members of the brain-working class. The same observation might be made of almost all arbitrators. Mr and Mrs Webb have investigated this question carefully and have come to the conclusion, that this class alone is capable of bringing to the task the highest qualities of training, impartiality and judgement. Out of the two hundred and forty arbitrations ranging from 1803 to 1897, which they investigated, only in one case, in an arbitration for a new agreement between employers and employed, had a member of the wage-earning class been chosen as umpire."
>
> [Knoop, 1905, p.30]

These quotations from Knoop illustrate very well the potential difficulty in striking the right balance between impartiality and experience. The impartiality/experience trade-off was an issue which was to play a major part in future debates over the appointment of arbitrators.

ii] Post-1945

Limited information is available in the literature on arbitrators in the post-war period. The Ministry of Labour Industrial Relations Handbook [1961] provides little insight. It refers to the three different forms of arbitration operating at the time. The first was through the Industrial Court where members of the Court were appointed by the Minister of Labour and "are independent persons, and persons representing employers and workers; one or more women have to be appointed." [p.137]. It is interesting to note this apparent gesture towards increasing the representation of women. The reason given for reserving places for women on the Industrial Court was the practical one that it was more appropriate for a woman to deal with cases which referred mainly to female employment[4]. The second form of arbitration was single arbitration and the third was a board of arbitration. In single and boards of arbitration, one or more persons were nominated by the employers and trade unions respectively and an independent chairman appointed by the Minister from a panel of what are described as suitable individuals. There is no explanation in the Handbook as to which members of society were deemed to be both 'independent' and 'suitable'[5].

The debates concerning the background and experience of arbitrators are not confined to the early part of the century and were the subject of examination by the Royal Commission on Trade Unions and Employers' Associations [1966]. The context of this examination was, as discussed above in Chapter 2, an attempt to resolve perceived industrial relations problems, in particular unofficial strikes, and their potential damage to economic performance. It should be stated, however, that in cross-examination of witnesses, the Commission did not pursue in depth or give priority to questions regarding the background and selection of arbitrators. Their concerns were more related to the process of arbitration itself, the potential impact of awards on inflation and debates concerning the possible extension of compulsory arbitration.

In evidence to the Commission and in response to the question, 'What sort of people make the best arbitrators - lawyers, economists, academics or others?', Sir Roy Wilson, QC [the last President of the Industrial Court], stated that:

> "the most important of all the qualities necessary for the good arbitrator is the personal capacity to inspire in the parties who come before him full confidence that he will hear and decide the reference with understanding and care and complete impartiality."[6]

Sir Roy was not pressed on his interpretation of 'complete impartiality'. He did expand his statement to contend that if one used his criteria, then anyone from the occupational categories cited could be an appropriate person to act as an arbitrator. But, it was his contention that lawyers did enjoy certain advantages, first in being accustomed to interpreting statutes and other documents, and second in hearing evidence and submissions. Sir Roy conceded, however, that these skills would mainly apply to participation in arbitration tribunals and boards of arbitration and were less important for cases submitted to single arbitration.

Additional support for the appointment of persons with legal training was forthcoming from another witness, Sir George Honeyman, CBE, QC. Although stating that it would be invidious of him to express any marked preference with regard to the professional group likely to provide the best arbitrators, Sir George argued that:

> "The lawyer starts with an advantage in that by his training he is accustomed to evaluating evidence. In separating the relevant from irrelevant."

But he was also cautious on the limitations of a legalistic approach:

> "He [the arbitrator] must, however, avoid being too legalistic both in his approach to the evidence and to the interpretation of agreements drafted by persons who tend to leave unexpressed matters which with their industrial knowledge 'go without saying'."

Sir George concluded by stating that experience of membership of a Wages Council provided valuable training and preparation for acting as an arbitrator[7].

It is interesting to note the support from two men trained in the legal profession for the appointment of arbitrators with skills which are often equated with those of a lawyer; and to speculate as to the extent to which lawyers are responsible for perpetuating a view of the mystique of 'legal' skills inaccessible to the layperson. Although this question was not explored by the Commission, further evidence in a Research Paper entitled 'Who are the Arbitrators', was presented by Lord McCarthy[8]. This paper examines the profile of a typical arbitrator operating in the USA and provides an interesting comparison with practice in Britain. McCarthy refers to evidence obtained from a survey of the membership of the National Academy of Arbitrators in 1962 which concluded that the typical experienced arbitrator in the United States was fifty-three years old; was educated to at least baccalaureate degree standard and probably had a law degree or Ph.D; had majored in one of the social sciences, most likely economics; had worked with the Federal Government with the National War Labour Board, the Wage Stabilisation Board during the Korean War or the National Labour Relations Board; was a university professor or lawyer who spent only part of his time in labour arbitration; and was someone who earned about one-third of his income from arbitration.

It is reasonable to conclude that considerations over the most suitable persons to act as arbitrators was not a major priority for the Commission as it made no specific recommendations concerning the recruitment and appointment of arbitrators. But, prior to the setting up of ACAS, a survey of conciliation and arbitration carried out by the Incomes Data Study in 1972 noted that:

> "In the UK Arbitrators are usually found from one of two sources, academics or lawyers, who often operate with lay assessors. Conciliation on the other hand has largely depended on the service provided by the Department of Employment."[9]

The first Annual Report of ACAS in 1975 records that the list of arbitrators previously used by the Department of Employment was made available to the new service and that "this panel consisted of 35

independents with knowledge or experience in industrial relations, labour economics or law."[10]. It notes the significant expansion of the panel to 120 members to cope with the increased case-load faced by the new service in the early years of its operation. The new recruits included employers and trade unionists nominated by the CBI and TUC respectively. Given previous concerns about impartiality, the appointment of employers and trade union officials is somewhat surprising. However, referring to the appointment of arbitrators on setting up the service, John Lockyer notes that the employer and trade union representatives involved had retired from their full-time employment:

> "ACAS appoints people from outside the Service to act as arbitrators and has tackled the problem of finding suitable people by appointing retired employer and trade union officials and by using independent academics with a wide knowledge of industrial relations. Most of the academics appointed by ACAS have also had practical experience in industry earlier in their careers. Retired conciliators and labour lawyers also make a valuable contribution."
>
> [Lockyer, 1979, p.59]

In an interview with John Lockyer he indicated that approaches were made to the Department of Employment and then the Wages Councils for prospective arbitrators, most of whom responded positively. Initially, however, there was a problem in obtaining sufficient people with relevant experience, and the only other people who did know about industrial relations were employers and union officials. As Lockyer commented:

> "We wanted people who knew about industrial relations. Ex-Members of Parliament we did not want."

Asked to explain his remark, Lockyer stated that they did not want ex-M.P.s on the grounds that they could be politically unacceptable to one or both parties. Instead they wanted people with a background knowledge of collective bargaining and dispute procedures.

However, the appointment of employers and trade unions caused some difficulty especially from other employers. Surprisingly perhaps it was not on the grounds of potential anti-employer bias from an arbitrator with a trade union background. Rather employers objected to the appointment of another

employer on the grounds that first "he may lean over to the trade union side" and second "he did not want another employer looking at his business.". Another drawback in appointing retired employers and trade union officials was their age and the time they had spent away from the business world, so although they did have industrial or commercial experience, it could be argued that it was outdated. In order to overcome the potential problems, Lockyer stated that the service appointed mainly academics and lawyers with practical experience and knowledge of industrial relations - "We found they did the best job."[11].

In a subsequent interview with Les Parsisson, Principal Industrial Relations Officer [Arbitration] and John Lockyer's successor, the question of the type of person most suitably qualified to be an arbitrator was pursued. He stated the main qualities required of arbitrators were that they should be acceptable to both parties, people of standing, independent, with analytical minds, trained to assimilate information, and capable of producing a comprehensive report understandable to the parties and issue an award which is without ambiguity. Academics and lawyers with industrial and commercial experience were deemed most likely to fit the above criteria. It was considered that politicians and others associated with specific political parties or those with radical political views of either right or left wing persuasion would not make suitable arbitrators on the grounds that they may not be acceptable to one side or the other. Therefore, the need for political disassociation especially from government in office is seen as necessary to ensure the confidence of both employers and trade unions officials coming to arbitration. This criterion relates very directly to the 'neutral', independent, separate from government, image which ACAS strives to reinforce.

Although the needs of the parties and ACAS in the appointment and selection of arbitrators has been discussed in conjunction, the main emphasis of this discussion has related to selecting arbitrators who have the ability to command the respect and support of the parties to arbitration. However, another more functional criterion of choice, from the standpoint of ACAS as an organisational structure, was also identified. What was evident from the interviews I conducted with the civil servants responsible for arbitration and from working on a day-to-day basis alongside ACAS staff members, was their

attempts to run an efficient, professional service for those concerned with voluntary arbitration in the public or private sectors - "All I aimed for was that we were professional."[12]. The code of practice within which they operated could be described as a consensual approach to dispute resolution, where what was considered to be the 'right' kind of person suitable for the role of arbitrator was evident to those most directly involved in the process. That is, a person who accepted the dominant ethos of the organisation and would be unlikely to upset any of the parties involved. One is reminded of the observations of Heclo and Wildavsky [1975] where they refer to the relationship between civil servants and the unwritten codes:

> "Kinship tells participants who is who; culture tells them how to act toward each other."[13]

Over time the civil servants and arbitrators build up a relationship of trust and confidence, again similar to that outlined by Heclo and Wildsavsky:

> "They all know or have heard about each other and enjoy rating one another. ...Mutual trust is considered paramount by officials who know they will have to continue doing business with each other year after year on issue after issue; they believe, that, if professionalism means anything, it means knowing how to treat members of one's own group."[14]

In summarising the debate on the selection of arbitrators, Lockyer [1979] concludes that the most important qualities required are those relating to character and personality - "To some extent these are inbred and to some extent they are acquired through experience." [p.59]. The method by which arbitrators gain their experience and build up the trust and confidence of civil servants and their peers, and the manner in which ACAS staff sought to improve the professionalism of the service, will be discussed below [see Section II of this chapter].

iii] Policy post-1979

Given the change of government post-1979 and the stated approach to industrial relations and labour market reform, one may have anticipated some changes in policy especially within the context of the shift to free market economics and civil service reform[15]. The consensual bias which was said to have dominated post-war economic policy and civil service behaviour, were features which, at least at the macroeconomic level, the new government was intent on changing.

From discussions with the civil servants involved, it would appear that, although they are sensitive to the different political climate and circumstances in which they are operating, there is a remarkable degree of continuity in [a] the practice of arbitration and [b] the appointment of arbitrators[16]. The officials argued that there was no change in the policy towards the selection and appointment of arbitrators following the election of the first Thatcher government. Especially where large national pay disputes in the public sector are concerned, every effort is made [and has always been made] to appoint an arbitrator or board of arbitration from the panel of arbitrators who have the necessary experience and will carry the trust and confidence of all those involved.

One case which did cause some controversy, and which resulted in an approach from 10 Downing Street, was recalled by an official. It involved a reference to arbitration from a company in the air services sector. When the arbitration award went against the company, the manager involved, who was a friend of Mrs Thatcher, wrote to her complaining that ACAS had appointed a left-winger from a College who knew nothing about the industry to conduct the case. A letter was sent to ACAS expressing Mrs Thatcher's concern. In the event, ACAS was able to reply to the effect that the arbitrator appointed had been a wing commander in the airforce; left the airforce to work as a personnel officer in industry and then at a later stage in his career became an academic. He, therefore, not only had industrial and commercial experience but an intimate knowledge of the industry involved. The matter ended there[17].

It would be naive, however, to suggest that no account is taken of the change of administration since 1979. For example, in the teachers' dispute in 1986, it was considered unlikely by a senior official that Sir John Wood [also Chairman of the CAC] would be accepted as an arbitrator, because of his alleged association with the newly founded SDP. It was also observed that another well known ACAS arbitrator, and previously Chairman of the Railway Staff National Tribunal, Lord McCarthy, would no longer be an acceptable arbitrator in a national dispute, because of his association with the trade union movement and the fact that he was a Labour peer.

The extent to which the government can interfere directly in the appointment process is itself constrained by the fact that the arbitrator must also be acceptable to the parties to arbitration. Parties to a major dispute are unlikely to accept an arbitrator whom they consider might be prejudiced against their case. Having said this, ACAS does attempt to retain as much control as possible over the appointment of arbitrators to specific cases:

> "Having got the parties agreement to go to arbitration we then like the right to choose who the arbitrator or board will be. The risk is that if the parties do not give us that right, we can end up in another dispute over the arbitrator. We choose the person we consider is most experienced for the case involved."[18]

As Les Parsisson commented:

> "The major principle is to maintain the integrity of the arbitration process. The appointment of an arbitrator against whom either party has a prejudice, either genuine or illusory, would not serve the best interests of arbitration."[19]

A distinction should be made between the different types of cases and experience of parties coming to arbitration. If the parties are relatively inexperienced and the reference involves a comparatively minor issue or small number of workers, then they are less likely to challenge ACAS's right to choose. However, in major national disputes where the two sides are likely to be represented by industrial relations personnel of some experience, then the parties will wish to be consulted in the appointment

process. To this extent the appointment of the arbitrator becomes an extension of the bargaining process. In this event it is usual for ACAS to suggest a few names to the parties and to ask them to rank their preferences. This process of consultation then results in ACAS formally making the appointment.

However, when the government itself is one of the parties involved in public sector disputes, the picture is more complicated. For example, in disputes over teachers' pay, it is normal for both the Employers' and Teachers' Panel to be consulted on the name of the person to be appointed as arbitrator. The Department of Education and Science, as a constituent of the Employers' Panel, will almost certainly seek the approval of their Secretary of State, who in turn may seek further parliamentary advice[20]. During the teachers' dispute in 1984, Sir Keith Joseph, the then Education Secretary, was accused by Mr Doug McAvoy, the Deputy General Secretary of the National Union of Teachers, of prejudicing the outcome of the arbitration by: "attempting to nobble the arbitrators before they have even begun their work"[21]. The accusation followed a statement by Sir Keith in The House of Commons to the effect that there was no more money to enable local authorities to meet any increase in pay awarded by arbitration. Owen-Smith et al [1989] record that, in the teachers' dispute in 1986, the parties were directly involved in negotiating a chairman of the board of arbitration from the names put forward to them by ACAS. Both sides rejected the first three names put forward to them and made their choice from the next five suggested. Therefore, in some cases, the appointment process can be more politically sensitive.

In the economic and political climate of the 1980s, it was observed by one official that some criticism had been made of older members of the panel of arbitrators on the grounds that they were out of touch with the current industrial relations' scene and new economic conditions. There is evidence to suggest that some account has been taken of this with the recruitment of younger members and the retirement of older members of the panel of arbitrators [see Section II of this chapter].

Because of the paucity of information on arbitrators, it was decided that a questionnaire survey should be issued to all ninety-four arbitrators on ACAS's panel of arbitrators in 1984. Bearing in mind that some arbitrators had been critical of a questionnaire issued by researchers at Warwick University in 1978, on the grounds of its length and complexity, it was decided to keep the questionnaire as clear and concise as possible[22]. On interviewing one arbitrator with regard to the present survey, he remarked:

> "I hope you are not a sociologist. I bet the Warwick questionnaire was written by one. I was not happy with it and returned it to them."[23]

The 1984 questionnaire, conducted as part of this thesis, was designed, discussed and agreed with ACAS staff involved directly in the appointment process. The questionnaire was designed to obtain a straightforward Yes/No response where this was appropriate; but also to obtain insight into the background and experience of arbitrators; the method of selection; their experience as arbitrators; and their attitudes and views relating to current practice and issues in arbitration. For this reason, many of the questions were open-ended to allow a wide range of views and comments to be expressed. The main findings of this survey were supported by interviews of selected arbitrators[24].

At a later stage of the research it was also decided that it would be valuable to ascertain the perceptions of the main participants in the arbitration process, that is the employers' representatives and trade unions involved. A questionnaire survey of all cases which went to arbitration in 1988 was then undertaken. Again the questionnaire was planned, discussed and agreed with ACAS officials in the arbitration service, the main objectives of which were to ascertain the views of the parties on their most recent experience of arbitration, their perceptions of the outcome and their attitudes to arbitration and the role of the arbitrator.

The results of these surveys do provide valuable information on some of the questions highlighted above, for example on the background, experience, and selection of arbitrators. In order to explore the issues of selection and training, additional material obtained from interviews with ACAS staff; an induction seminar for potential arbitrators; annual arbitrators' seminars; and bulletins issued to

arbitrators by ACAS have also been analysed. Section II of this chapter explores these issues. Subsequent chapters will look in more detail at the process and results of arbitration.

PART II ARBITRATORS AND THEIR APPOINTMENT: THE EVIDENCE

i] Personal Background

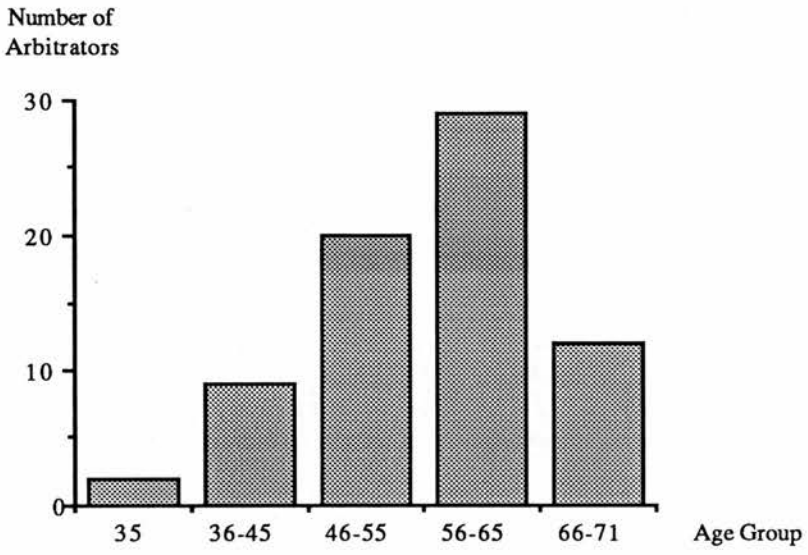
The questionnaire was issued to the 94 arbitrators on ACAS's panel as at 1984 and 73 replies were received - a response rate of 78%. One reply was in letter form only, explaining that as the arbitrator had been on the list for some time but had not been instructed to arbitrate, he felt he could not usefully complete the survey. The sample should, therefore, be reduced to 93 arbitrators and 72 replies - a response rate of 77%. Questions were asked concerning the personal background of the arbitrators including their sex, age, education and qualifications.

The vast majority of arbitrators are men with only 8, that is less than 10 per cent, women on the panel, 7 of whom responded to the survey. The main reason given by officials for the low representation of women was the difficulty in identifying enough women with the relevant industrial and commercial experience. This is a fairly standard response not unfamiliar as an explanation for the under-representation of women in other occupations or appointments. An additional factor advanced was that, in some cases, the parties - the majority of whom are men in industrial relations - may not find a woman arbitrator acceptable[25]. It was considered that attitudes were changing, however, and that ACAS now employed more female conciliation officers, a policy which will bring more women into the industrial relations field[26]. Since completion of the survey there has been a modest improvement in recruitment of women arbitrators with 4 women coming onto the panel compared with 11 men[27].

The age profile of the arbitrators ranged from 35 to 71 years of age [see Figure 3.a and Appendix I, p.2] with the majority of arbitrators, 49 [68%], aged between 46 and 65.

FIGURE 3.a

Age Profile of Arbitrators



Source: Brown, Questionnaire Survey of Arbitrators - see Appendix I.

Again since completion of the survey a number of arbitrators have been retired by ACAS from the panel. All of the new arbitrators recruited since 1984, fall within the 35 to 55 age group [at the time of appointment]. The result of these changes is that the number of arbitrators currently on ACAS's panel has been reduced to 70[28]. Apart from encouraging older members to retire the incentive to reduce the size of panel is a response to the reduction in the number of cases coming to arbitration in the 1980s.

The largest number of arbitrators 37 [51%] were educated at an English grammar school; 9 at a Scottish or Welsh equivalent; 10 at non-grammar; and 3 at public school. Of the remaining 13 arbitrators, 9 were educated in the UK and 4 abroad, but they did not specify the type of school attended. Ninety-four per cent of arbitrators [68] received post-school education at college or

university, with eight-seven per cent [63] receiving a degree, ten of whom had degrees from more than one university. Of the 50 arbitrators who specified which university they had attended, 13 were graduates from Cambridge or Oxford [see Appendix I, pp.3/5]. It is interesting to note the educational background of arbitrators, and specifically the relatively small number of public school pupils and Oxbridge graduates in comparison with senior civil servants.

A broad range of subjects were studied by the arbitrators mainly in Social Sciences or Arts Faculties. Twenty-one arbitrators had studied Economics and 12 had legal qualifications. In addition 32 arbitrators listed other professional qualifications such as Fellow or Member of the Institute of Personnel Management and 23 listed other educational or industrial qualifications including Certificates/Diplomas in Trade Union Studies, Personnel Management and Business Administration, or postgraduate degrees [see Appendix I, pp.6/9].

ii] Experience

In order to test the criticism that arbitrators were amateurs with little industrial and commercial experience, questions were asked concerning the past and current experience of those involved.

Fifty-four [75%] arbitrators said they had industrial or commercial experience. This figure was somewhat surprising, as it is ACAS's policy only to appoint arbitrators who have some relevant background experience. This practice can be compared to the situation discussed by Davidson [1979] concerning lawyers who were appointed as Board of Trade arbitrators, and were employed as much for their knowledge of particular trades as their expertise as lawyers. It is possible, therefore, that some arbitrators under-stated or under-valued their previous experience. A broad range of experience was quoted by the arbitrators including industry, banking, insurance, accountancy, engineering, civil service, printing, journalism and the retail sector, with three arbitrators having worked as miners and another as a docker [see Table 3.2]. There was a bias towards experience of management with 49

[68%] of arbitrators having had such experience in industry/commerce, the civil service or universities [see Table 3.3]. Only 25 [34%] had experience as a trade union official, and just 4 had been full-time officials [see Table 3.4]. Sixteen [22%] arbitrators had legal experience at the Bar, as Lecturers in Law, or through Industrial Tribunals and other organisations. Similarly sixteen [22%] arbitrators were ex-civil servants having been employees of ACAS, the Department of Employment or the Ministry of Labour. Since 1984 there have been no appointments made from the ranks of ex-civil servants. A majority of arbitrators, 50 in total, had served in H.M. Forces. Finally, 58 arbitrators said they had additional industrial experience including consultancy work [see Appendix I, pp.10/16].

TABLE 3.2

Industrial/Commercial Experience of ACAS Arbitrators

Work Experience	No. of Arbitrators
Company or Industry [1]	11
Banking, Insurance and Accountancy	5
Engineering [1]	2
Civil Service [1]	4
Clerical	3
Personnel Management	8
Management - General	4
Management - Company Executive	1
Management - Directors	2
Journalist	1
Consultancy [1]	1
Chairman of Industrial Relations Court	1
Miner	3
Docker	1
Printer	1
Shop Assistant	1
Vocational Work [1]	3
Unspecified	4

[1] Actual job unspecified

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I.

TABLE 3.3

Management Experience of ACAS Arbitrators

Management Experience	No. of Arbitrators
Industrial/Commercial	24
Civil Service	14
University/Education	10
H.M. Forces	3
Unspecified	2

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I.

TABLE 3.4

Trade Union Experience of ACAS Arbitrators

Trade Union Experience	No. of Arbitrators
Lay Official	13
Full-time Official	4
Shop Steward	2
Safety Representative	1
Research	2
Unspecified	3

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I.

At the time of the survey 48 [66%] of arbitrators were in full-time employment, 45 of whom worked in universities as professors, heads of department, senior lecturers, lecturers and tutors. At the time of their appointment to the panel, 57 arbitrators were employed in universities, 1 was a barrister, one a manager and 13 had retired [see Table 3.5]. This breakdown of posts reflects a shift in the recruitment of arbitrators since the days of the Board of Trade [see Davidson, 1979 and Table 3.1] However, as is illustrated in Tables 3.2, 3.3 and 3.5, the figures under-state the previous labour market experience of the arbitrators, as they refer only to the posts held by the arbitrators at the time of their appointment. For example the figures do not reflect the broad range of experience gained from manual and non-manual work, managerial posts, trade union activity, and employment in the civil service or the legal profession. What can be observed from comparing Tables 3.1 and 3.5 is the marked increase in the recruitment of academics, the decline in the appointment of civil servants and the disappearance of politicians from the list of arbitrators.

TABLE 3.5

Occupation of ACAS Arbitrators at time of Recruitment

Occupation	Number of arbitrators	% of arbitrators
University	57	79.17
Barrister	1	1.39
Manager	1	1.39
Retired[1]	13	18.06

[1] Mainly Ex-Civil Servants

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I.

The profile of the 'typical' arbitrator in ACAS's panel in 1984 could be summarised as follows:

- male
- over 45 years of age
- educated in an English grammar school, or a Scottish or Welsh equivalent
- educated to at least first degree level
- employed in a university as a professor, head of department, lecturer or tutor
- previous industrial or commercial experience
- management experience in industry, commerce, university or the civil service
- handled ten or more arbitration cases[29]

The views and perceptions of the users of the arbitration service were also sought through a questionnaire survey[30]. Asked their views on the appropriate qualities in an arbitrator which were essential or important for effective arbitration, 98% said impartiality; 90% said industrial/commercial experience; 96% said knowledge of industrial relations and collective bargaining; 54% said knowledge of particular industry involved; 98% said independence; 94% said authority; 88% said experience in settling disputes by arbitration; and 98% said ability to understand complex problems quickly. Asked to identify other qualities which the 'ideal' arbitrator should have, employers' representatives referred to the ability to communicate and knowledge of the organisation; on the trade union side patience was the most quoted quality. More than 84% of the parties considered the arbitrator's primary job should be the settling of the dispute; 78% agreed that the arbitrator should not have any recent direct association with management; and 75% said they should not have any recent direct association with a union. But when asked to note any other comments they would like to express regarding their personal experience of ACAS arbitration, some parties were critical of the appointment of academics and lawyers as arbitrators.

The above views highlight the problem of the experience/impartiality trade-off referred to in Section I above, that is how an arbitrator can both have the necessary experience yet not be too directly associated with and impartial between one side of industry or another. One method of overcoming this problem is through the appointment of assessors with experience of a particular industry to assist the arbitrator. It is practice for two assessors to be appointed, one representing each side of industry, from a panel of potential assessors nominated by employers and trade union organisations.

There is a historical precedent for resolving the trade-off in this way. Lord Amulree [1929], who was himself an arbitrator and President of the Industrial Court, records that in highly technical cases, the single arbitrator may have the help of assessors. The role of the assessors was a consultative one, and they did not share responsibility for the awards[31]. Forty-six of the arbitrators who completed the questionnaire in 1984 had been assisted by assessors in cases they had dealt with. They cited the advantages of their service as their first hand knowledge of the industry or technical knowledge and their support and advice after the hearing. One example of the response to this question was:

> "I began the hearing a little more informed as to the general system between the parties by having a preliminary discussion with the assessors. Similarly I was able to get from them after the hearing minor points of information which had not come out during the hearing but which subsequently appeared relevant. In two cases it was helpful to find the extent to which the assessors had formed similar judgements.

Twenty-seven of the arbitrators considered that the main disadvantage of having assessors was that they sometimes exceeded their role and were often not always objective, acting as an advocate of the parties. This was thought to be particularly so of the trade union representatives. Additionally it was thought that they could lengthen or formalise proceedings. An example of the response to this question was:

> "They are often strongly biased towards only one of the parties and often tend to regard their role more as that of an advocate of the party which they traditionally might be expected to support."[32]

In spite of any disadvantages which may be experienced by the arbitrator, the use of assessors is one method of satisfying the parties to arbitration that the relevant experience and knowledge will be utilised at the hearing.

Boards of arbitration, made up of an arbitrator and two side members, is another method of broadening the expertise available. Boards are normally reserved for major cases especially national pay disputes, where it is deemed appropriate to have more than one person involved in the process. As with assessors, side members are chosen from both sides of industry to assist the arbitrator. Fifty per cent of the arbitrators surveyed had acted as Chairpersons on a board of arbitration. Again arbitrators found both advantages and disadvantages in the services of side members. Arbitrators welcomed the specific expertise and insights which side members could bring, for example one arbitrator commented that:

> "It reduces the possibility of missing important clues in both written and oral presentations. With their respective management and trade union backgrounds, side members may provide insights into a problem that might not occur to an independent. After the hearing a discussion among three people may be better than the internal discussion of an arbitrator."

Similar disadvantages in the services of side members to assessors were noted, for example:

> "The main disadvantage occurs if the representative of the union or employer simply acts as an advocate of the case of their respective side and are not willing to act in any kind of conciliatory capacity; at worst they transmit to the Board the same kind of deadlock as already exists; they also prolong the proceedings sometimes leading to postponements and adjournments."[33]

The distinction between assessors and side members is that the former are not responsible for the final decision made by the arbitrator. Side members on the other hand participate in the decision-making process and give their own opinion. In the event of a disagreement between members of the board, however, the arbitrator's decision is final. It obviously adds more weight to the outcome if the decision of the board is unanimous[34].

In summary, from the evidence cited, criticism of academics and lawyers on the grounds of insufficient industrial and commercial experience and their detachment from the realities of the market place would not appear to be justified. First, on the grounds that most arbitrators have varied work backgrounds; and second, because arbitrators can call on the particular expertise of assessors and side members should a specific case warrant specialist knowledge or assistance. Also, given the changes which have occurred in the higher education sector in the last decade, including the introduction of management accounting techniques, it could be argued that the view that academics are out of touch with the realities of economic constraints and market pressures is an outdated one.

iii] Selection

The method by which arbitrators are invited to join ACAS's panel is somewhat of a mystery even to the arbitrators themselves. Rather like candidates for leadership of the Conservative Party, names of potential arbitrators 'emerge' from those connected with the service. The arbitrators were asked how they were recruited to the service. The majority, 45 [62%], said they had been approached and recruited by ACAS staff; 8 contacted ACAS themselves with a view to offering their services; 6 were encouraged to approach ACAS by a third party [normally another arbitrator]; and 13 either followed on from the Department of Employment or Ministry of Labour panel, or quoted a combination of the above options. When interviewed, most arbitrators who had been approached by ACAS were unaware why they had been selected.

This latter point was pursued with ACAS staff. The criteria for selection referred to by officials were mainly those identified in the earlier discussion in Section I of this chapter on the qualities required for an arbitrator [see in particular interview with Les Parsisson]. That is they look for people with knowledge of industrial relations and with an industrial or commercial background; someone they consider is independent, fair minded, apolitical and capable of making sound judgements. Officials

identify such people in the industrial relations field either at the regional or Head Office level. The potential arbitrators may have been involved with ACAS in some form or another through the advisory or conciliation service and their names put forward by a conciliation officer; known to ACAS staff through conferences or seminars; or recommended to the service by another arbitrator.

Once a potential arbitrator has been identified, the normal process is that he or she is invited to attend an induction seminar[35] along with other potential recruits. This gives the recruit an opportunity to meet ACAS staff and ask any questions about the role of an arbitrator and the arbitration service. It also enables ACAS staff to assess whether or not the person is likely to have the necessary potential to become an arbitrator and thus fit in and be accepted. An invitation to join the induction seminar does not guarantee selection onto the panel, and recruits are not informed of the reasons should they fail to be selected. A well known and experienced arbitrator who had proposed a colleague as someone whom he considered had the necessary skills and qualifications, was somewhat surprised when the gentleman was invited to and attended an induction seminar but was not appointed by the service. Both the arbitrator and the unsuccessful candidate were unaware of the reasons for his failure[36].

At the seminar which I attended, the Chief Conciliation Officer, the Director of Conciliation and Arbitration and the Principal Industrial Relations Officer were in attendance as ACAS officers. In addition participants had the opportunity to meet the ACAS chairman[37] over lunch. The seminar was under the chairmanship of an experienced and well known arbitrator. Of the people invited to attend the seminar as potential arbitrators, two were Ex-Directors of ACAS, two were academics [one a lecturer in economics, the other a senior lecturer in law], and the fifth person was an ex-national officer for a major union and at the time was employed as an Industrial Relations Manager in the retail sector[38].

The seminar was conducted by an experienced arbitrator and ACAS's Chief Conciliation Officer, who covered issues including conciliation and the pre-arbitration process; the arbitration process itself; and practical questions including how to approach the writing of the arbitrator's report[39]. Potential

arbitrators were introduced to certain conventions and policy approaches. For example it is ACAS's policy to preserve the separate integrity of the conciliation and arbitration process and to discourage any interaction between the conciliation officer and the arbitrator. There are two reasons put forward for this practice. The first relates to the belief that arbitration is very much 'the last resort'[40] in a dispute and that every effort should be made to encourage the parties to settle the dispute themselves or with the assistance of a conciliation officer without resort to arbitration. It is assumed that arbitration should be used only when other avenues of dispute resolution have been pursued and exhausted. The importance of the move to the arbitration stage is that the third party [the arbitrator] and not the parties is then responsible for making an award to settle the dispute. Second, there is the view that the arbitrator should come to the issue fresh and with an open mind. Any communication between the arbitrator and conciliation officer, therefore, could run the risk of prejudicing this objective. This was an issue which was to be raised again at arbitrators' seminars and reinforced in the bulletins issued to arbitrators [see discussion below under 'Training']. It was also stated that, while accepting the principle of 'last resort', it was ACAS's policy to encourage the writing-in of arbitration clauses into disputes procedures and the setting up of standing boards of arbitration as an alternative to proposals for legally binding arbitration or no strike agreements.

An interesting discussion of the function of arbitration then took place - interesting because, as discussed earlier [Section I of this chapter], how the state perceives the role can impact on the process and the type of people chosen to fulfil the tasks of an arbitrator. The primary function of arbitration was argued to be the resolution of disputes, although the experienced arbitrator present added that there was an important function in encouraging the parties to take a more dispassionate approach to their problem and to enable them to 'save face'. The question of whether the dispute should be resolved on the basis of the justice of the case or on the grounds of what the arbitrator judged to be acceptable to the parties was then explored. It was acknowledged that there may be differences of opinion or approach on this question. At the end of the day, however, "The object is to get a settlement" [experienced arbitrator]. The pressure to reach a settlement and resolve the dispute in a manner acceptable to the parties is understandable. The service prides itself in its record in this regard.

Although the awards issued by arbitrators are not legally but morally binding, there are extremely few cases where the award has not been implemented. The people needed to carry out this function, therefore, are not social reformers interested primarily in redistribution or social justice; neither are they likely to be dogmatic and doctrinaire. As the experienced arbitrator present commented:

> "You should not see yourself as a social worker in industry."

Instead there is a stress on a consensual approach to the resolution of the dispute. This is not to contend that ultimately there will be no bias in favour of employers or unions or that the consensus need be one which favours both parties necessarily[41]. It could be argued, however, that in general terms a successful arbitrator will be one who can fit in with the dominant ethos of the organisation and the economic and political orthodoxy under which is operates. More specifically, in relation to any particular case, the skill of the successful arbitrator is to evaluate the balance of power between the parties and issue an award which reflects this[42]. As the experienced arbitrator remarked so succinctly:

> "The skill of the good arbitrator is to recognise the lion and award him the lion's share."

Once accepted onto the panel, new arbitrators become part of what Heclo and Wildavsky [1979] describe as the 'nuclear family' where they learn the "norms of desirable behaviour" [p.40]. But, how do they learn what they are supposed to do? Similar to Heclo and Wildavsky's reference to the learning of Treasury norms, new arbitrators begin by sitting alongside experienced arbitrators before they take their first case and make their first decision. Experience is then built up through conducting further arbitrations and different types of cases.

> "They learn what is expected of them; by taking decisions; and discovering how others react to what they do."
>
> [Heclo and Wildavsky, 1979, p.41]

Discovering how others react to what they do mainly takes place at arbitrators' seminars to which all arbitrators are invited each year. In this way arbitrators' learn from one another and are introduced to the appropriate norms of behaviour.

iv] 'Training' the Arbitrators

Although a distinction has been drawn here between selection and 'training' of arbitrators, as will become evident from the discussion below, there is a strong inter-relationship of continuity between the two processes. That is, the selection process itself would appear to be a major part of the 'training' which is then reinforced through, at a later stage, seminars and bulletins.

The 'training' of arbitrators is a relatively recent phenomenon. As the experienced arbitrator in the induction seminar stated:

> "I have been arbitrating in the UK since 1970 and when I started I just started. There were no briefings etc."

Policy changed in the early 1980s, however as the Chief Conciliation Officer outlined:

> "Two years ago we set in motion a policy review of the arbitration process. Not the kind the Department of Employment would conduct for the Cabinet. We wanted to know in what ordinary ways we could enhance the process of arbitration."[43]

The reasons for this review were a genuine interest on the part of the civil servants to provide, what they described as, a more professional service to the parties. It is probable that other objectives were to prevent criticisms being made of the service and to offset the possibility of a change in government policy. Even if the new Conservative government did not intend to abolish ACAS itself, it was not beyond the boundaries of possibility that they could have privatised certain functions of the service, by

no longer providing it as a public service and leaving the private sector to step in if industry required it[44].

The policy review resulted in the instigation of arbitrators' seminars and the issue of bulletins to arbitrators.

The first bulletin issued to arbitrators in 1982 outlined the main results of the policy review and its impact on future policy. The main items covered included terms of reference; the separation between conciliation and arbitration; boards of arbitration and the role of side members; the role of the arbitration secretariat; the giving of recommendations in the arbitrator's report; reasoned awards; the encouragement of standing arbitration arrangements; and the selection, training and briefing of arbitrators. The first bulletin outlines past and new policy for selection and training as follows:

> "At some seminars the question of selection for the ACAS list of arbitrators was raised. At present this was by informal recommendation and talent spotting. This could continue and arbitrators are asked to keep an eye out for potential candidates. Whilst there was an acceptance of the traditional ACAS method of training new arbitrators by the method of letting them sit in with one or two experienced arbitrators, the seminars have shown that there were great benefits to be achieved by organised communication and discussion amongst arbitrators. Apart from rare occasions when an ACAS secretary was provided, arbitrator worked in isolation with very little feedback reaching them as to the quality of their performance; they had no standards on which to judge themselves until occasions such as these seminars arose when they were able only to compare practices and attitudes with other arbitrators; these comparisons were partly reassuring but for the most part they had caused each arbitrator to question his own performance and possibly to see better ways of doing his job, particularly with regard to the judgements he was asked to make."[45]

Arbitrators were informed in the second Bulletin that in order to improve the method of selecting arbitrators, arrangements would be made to introduce induction seminars:

> "The idea will be to air a number of current industrial relations topics, including arbitration itself and to establish the necessary working links if they are to be widely deployed in an independent role by the Service. The induction would be completed by 2 or 3 opportunities 'to sit with Nellie'[46] on specific cases."[47]

The induction seminars thus commenced in 1982.

Subsequent bulletins were used to inform arbitrators of general developments in the industrial relations field, for example the experience of pendulum arbitration; any policy changes within ACAS specifically relating to arbitration; proposals for seminar arrangements and topics; the appointment of new arbitrators or council members and changes in ACAS staffing; and to reinforce ACAS policy and practice in matters relating to arbitration. The latter can be viewed as a method of encouraging 'good practice' and uniformity of practice amongst arbitrators. The first bulletin had noted that the first seminars had:

> "shown that practices, procedures and even attitudes varied considerably between one arbitrator and another."[48]

This was also evident at the arbitration seminars which I attended during the years 1984 to 1989. In the main, differences which did occur were between the relatively well known and more experienced arbitrators who had built up a personal reputation over the years. Their differences of views and approach were not only known but accepted by ACAS staff. However, is was extremely rare for new arbitrators to deviate from the accepted norms of practice identified by ACAS staff, and on the few occasions when they did - for example when one arbitrator admitted that he had contacted a conciliation officer to ask for further details of the case with which he was dealing, this did not meet with approval[49]. On a number of key areas including sticking within terms of reference, not giving

reasons but considerations in an award, and not giving recommendations the seminars were also used to reinforce ACAS policy[50].

The seminars instigated in 1981 were held on an annual basis[51]. The format varied from year to year partially as a result of feedback obtained from arbitrators who attended seminars. It was usual for ACAS staff to summarise developments in industrial relations and government policy, and outline the changes and trends in the workload of the service, before giving arbitrators the opportunity to ask specific questions. The programme normally included papers given by arbitrators on their research relevant to arbitration; case studies of arbitration cases; and workshops to allow arbitrators to discuss any specific problems or explore issues of interest to them[52]. The seminars were attended and chaired by senior staff in ACAS including the chairman of the service. Conducting an arbitration is a rather lonely task, the seminars thus provided a forum for arbitrators to meet each other and ACAS staff on a relatively informal basis and exchange experiences and seek advice.

In the questionnaire survey of arbitrators the role of the bulletins, induction training and seminars, as perceived by the arbitrators, was pursued. Arbitrators were asked 'Could ACAS do more than it presently does in the form of bulletins, induction training and seminars to enhance industrial relations arbitration?'[53] Twenty-seven arbitrators answered yes to this question, recommending more regular meetings, more publicity for the arbitration service and residential seminars; 32 answered no; 3 said possibly; 6 said don't know; and 2 did not respond. The arbitrators answering yes to the question were asked to suggest ways in which the training could be improved, for example whether they favoured obtaining professional qualifications or becoming a member of an Institute. Varied comments were made, but most arbitrators were against the two options mentioned, but recommended that greater exchange of information about specific cases would be valuable. However, it was considered that the process of training could be taken too far with possible implications for the independence and acceptance of arbitration. The best qualifications and experience were still considered by the arbitrators to be industrial relations experience.

Summary

At first sight there would appear to be some significant changes in the recruitment of arbitrators and the role of the state in training suitably qualified persons to undertake the duties of an arbitrator. As has been outlined above, if we compare the backgrounds of arbitrators; the training of arbitrators; the perceived function of arbitration; and the economic and political climate and orthodoxy in which the service operates, it can be contended that some shifts in practice have indeed occurred. However, if we subject these indicators to more thorough analysis, the changes are not as significant as they first appear.

For example, the shift in the social composition of arbitrators in 1990 is not surprising and is consistent with social trends in other professions and public appointments. Occupational and class mobility account for changing patterns of representation. Therefore, it would be unusual if the composition of arbitrators had not changed over time. What is evident, however, is that arbitrators are still part of the 'brain working class' referred to by the Webbs, although they may not always have been so as some arbitrators began working in manual trades; and they are people with experience of the issues most likely to come to arbitration, similar to those appointed under the Board of Trade.

The evidence would suggest that the more formalised selection and training of arbitrators in the 1980s through seminars and bulletins would appear to be a relatively new development not evident in past practice. But arbitrators have always had direct communication with the key civil servants involved in delivering the service. Further they have always been drawn from a relatively small network of people who are likely to have contact with one another in other spheres of their working lives.

The function of arbitration remains the desire by the state to offset economic dislocation which industrial disputes may cause. With some notable exceptions, especially in the public sector, where the employer has been prepared to hold out against a strike[54], the continuation of strikes is deemed to

be costly both to employers in the form of lost profits and to workers in lost pay, but also in a wider social, economic and political context. If industrial disputes and strikes are considered to have an adverse effect on the economy, then speedy settlement of the dispute will be encouraged. Under voluntary arrangements, it is argued by arbitrators and those closely connected with the service that the parties would not come to arbitration unless they were willing to concede something in order to reach a resolution. Where parties are not willing to make concessions, the case is unlikely to come to arbitration in any event. The 1989/90 ambulance dispute was one such case where the government was unwilling to allow arbitration as an option on the grounds that there were insufficient public funds to pay for any increase above the final offer made by management. Whether arrangements are voluntary or compulsory, therefore, relates very directly to how the state perceives the costs of industrial action and the practicality of workability of one system or another. This is an issue which has changed little over time.

Finally in relation to the specific economic and political climate prevailing at any given time, again it can be argued that arbitration practice is likely to reflect rather than set the dominant ethos and values. If the post-war consensus thesis is accepted, the period immediately following the war can been seen as a time of relative consensus concerning the state's approach to industrial relations, regardless of the political party in power. In addition the period is marked by the growth of tripartite methods of problem solving and policy making. ACAS and its arbitration service is a reflection of these developments. It may have been anticipated that with the election of a government espousing the benefits of non-consensus and a free market approach to running the economy, which effectively excluded labour from decision-making arenas, that the arbitration service and hence the role of the arbitrators may have undergone major changes. Apart from the moves to inject 'new blood' into the panel of arbitrators and the obvious awareness of increasing financial constraints and developments especially in the public sector, the dominant ethos in arbitration has changed little. Thus there would appear to be a form of dualism [Goldthorpe 1984] in the state's treatment of industrial relations. On the one hand the role of trade unions in macroeconomic policy making has diminished in the 1980s, tripartism is discouraged and the law has been used on a number of occasions with a view to reforming

industrial relations in Britain. Yet on the other, tripartism in ACAS is a necessary function for its acceptance by the parties and its continuation and survival. These arguments will be developed below in the chapter on the survival and future of ACAS.

---

1 If ACAS considered it was in the best interest of the parties, arbitrators and the arbitration service itself that arbitrators should remain relatively anonymous, it is likely that their wishes would be respected by the industrial press. One can only speculate as to the reasons why the press should collude with this practice. It could be explained in terms of the relationship which has built up over the years between the press and ACAS officials. It is likely that the press would respect ACAS's wishes on certain matters, so that they would continue to benefit from access to information on industrial disputes which are of interest to them. Also, within the present system of arbitration practice, there may be little to gain from publicising the identity of arbitrators. This can be contrasted with the practice in the United States where the names and awards of the arbitrators are known. This information is used by parties in their future choice of arbitrator.

2 See discussion in Concannon [1986] and his recommendations for future research.

3 See Appendices I and III for full results of questionnaire surveys of arbitrators and the parties to arbitration in 1988.

4 The logic of including women to act as independent persons and arbitrators, even for the practical reason stated, does not appear to have been applied in future practice. As the survey of arbitrators on the ACAS panel of arbitrators in 1984 illustrated, only 8 out of a total of 94 arbitrators were women. This is a very low percentage when one considers that women comprise almost fifty per cent of the labour force in Britain.

The failure to appoint women in the industrial relations field led to a particular problem for ACAS when designating a panel of Independent Experts under the terms of the Equal Value legislation. Independent Experts assist Industrial Tribunals, when required, in deciding whether two jobs are of equal value by carrying out a detailed job evaluation study of the two jobs in question and preparing a report. Given the nature of the legislation, one could argue that it would have been preferable to have equal representation, at least, of men and women on the panel, but ACAS ran into difficulty in identifying a sufficient number of women with the necessary industrial relations experience. Out of fourteen experts designated by ACAS to the panel, only three are women - see ACAS Annual Report, 1989.

5 Although the concepts of independence and suitability are not discussed explicitly, they can be linked with and understood within the context of the dominant ethos which existed in relation to views of the state and the civil service. That is with the liberal democratic view that the state is neutral and that, in theory at least, civil servants are politically neutral.

6 Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence 45, 1966, p.1931.

7 Ibid, Minutes of Evidence 60, 1966 p.2163.

8 See Research Paper No.8 to the Donovan Commission.

9 Quoted on page 15 of the Incomes Date Study No.35, Conciliation and Arbitration [1972].

10 ACAS Annual Report, 1975, p.14.

11 Evidence gathered from interview with John Lockyer in 1989.

12 Comment made by John Lockyer during my interview with him in 1989.

13 Quoted on p.14 of Heclo and Wildavsky [1975].

14 Quoted on p.15 of Heclo and Wildavsky [1975].

15 A related issue of relevance to the discussion and analysis of the arbitration of ACAS is the question of civil service reform post-1979. It has not been possible within the scope of this thesis to analyse the topic in any depth. This is a subject on which future research could usefully be carried out.

16 The continuity in the practice of the whole process of arbitration will be developed in the chapters which follow.

17 The particular case was recalled by John Lockyer during my interview with him in 1989.

18 Quote from interview with senior ACAS official.

19 Quote from one of the many interviews with Les Parsisson. I worked directly with Mr Parsisson during my time at ACAS Head Office.

20 Information from ACAS officials.

21 Quoted in a report in The Guardian, 20 June, 1984.

22 The Warwick survey involved issuing questionnaires to the arbitrators involved in arbitration cases on the basis of a one in four sample. The focus was on the most recent disputes handled by the arbitrators, details of the specific case, terms of reference, arrangements for the hearing, the arbitration hearing itself and the outcome of the arbitration - information which can be obtained from ACAS's records. As far as the writer can ascertain the results of the questionnaire have not been analysed or reported.

23 It is probably best that the identity of this arbitrator remains hidden for fear of retaliation by sociologists!

24 Arbitrators were selected for interview mainly on the basis of 'availability', either when they were attending Head Office to conduct an arbitration or at ACAS seminars. In addition I interviewed some of the arbitrators who were located in Scotland.

25 See discussion in footnote 4 above.

26 Information received from ACAS senior official.

27 In 1986 three new arbitrators were recruited, all of them men; in 1988 four new arbitrators were recruited, three men and one women; in 1989 two new arbitrators were recruited, one man and one woman; and in 1990 six new arbitrators were recruited, four men and two women.

28 In the Arbitrators' Bulletin No.10 [May 1989], it was noted that there were now 64 'active' arbitrators on the ACAS panel. Since that time a further 6 arbitrators have been recruited - see Bulletin No.11 [May 1990].

29 The results of the survey were made available to Sir Pat Lowry and information on the profile of the typical arbitrator included by him, with my permission, in his book on third party intervention - see Lowry [1990a]. It is interesting to compare the profile of British arbitrators with the profile of the typical American arbitrator discussed in Section I of this chapter - see McCarthy's research paper to Donovan Commission [although the figures for American arbitrators are now somewhat out-of-date]. There would appear to be a greater tendency for American arbitrators to be legally qualified and to be paid more than their British counterparts. British arbitrators receive a modest payment for their work. The daily fees payable to arbitrators for arbitration and mediation hearings, as from 1 April 1990, is £137 and the hourly rate for preparatory work and report writing is £9.79 per hour [see Arbitrators' Bulletin No.11, May 1990].

30 A total of 223 questionnaires were issued, 161 in respect of single and boards of arbitration and 62 in relation to cases brought by the Electricity Supply Industry. 203 questionnaires were returned completed, a response rate of 91%. See Appendix III for full report of survey.

31 Lord Amulree was referring to practice in the early years of the Conciliation Act 1896. See Amulree [1929, p.112] for discussion of this.

32 See pages 24/26 of Appendix I.

[33] See pages 27/29 of Appendix I. A further disadvantage of side members or assessors not noted by the arbitrators but mentioned by Les Parsisson is that the parties could be discouraged from making a proper presentation of their case in the expectation that this deficiency would be put right at a later stage by the side member/assessor. This could result in the arbitrator making a decision on some important point or aspect of the case on which one side did not have the opportunity to develop.

[34] Another distinction between side members and assessors is that ACAS pays expenses of side members and no payment is made to assessors.

[35] The seminar I attended in November 1983 was described as a 'Seminar of Potential Arbitrators' and took the form of a one day event. The latest seminar held in February 1990 was described as an 'Introductory Seminar on Arbitration' and lasted for two days.

[36] Eight potential arbitrators were invited to the Introductory Seminar in Arbitration in February 1990 and six were subsequently appointed.

[37] The Chairman of ACAS at this time was Sir Pat Lowry.

[38] All were accepted onto the ACAS panel of arbitrators and participated in the questionnaire survey.

[39] The programme for the Introductory Seminar on Arbitration for potential arbitrators which was held in February 1990 was as follows. Day 1: Welcome and Introduction [Dennis Boyd, Chief Conciliation Officer]; Arbitration - The Background [George Kahan, Director of Conciliation and Arbitration]; Conciliation and the Pre-Arbitration Process [Dennis Boyd]; The Arbitration and Mediation Process [Experienced Arbitrator]. Day 2: Experience as a New Arbitrator [New Arbitrator]; Arbitration Case Studies [Experienced Arbitrator]; Handling the Arbitrators Report and Aftermath [Alastair Campbell, Arbitration Section - replaced Les Parsisson on his retirement]; and Open Forum and Review [Dennis Boyd and George Kahan].

[40] As discussed above in Chapter 2, there is an historic precedent for this principle - see Chapter 2, [ii] and footnote 3 for discussion of arbitration as 'last resort'.

[41] The outcome of awards themselves will be the subject of another chapter [see Chapter 5].

[42] This was an issue debated by arbitrators at their seminars.

[43] Quotes from seminar for potential arbitrators in November 1983.

[44] This theme will be pursued in Chapter 6. The most likely area of cutback in ACAS was the advisory service.

[45] See ACAS, Arbitrators' Bulletin No.1, Review of Arbitration Services.

[46] 'to sit with Nellie' refers to the practice of sitting in with an experienced arbitrator before a new recruit takes up his or her first case.

[47] See ACAS, Arbitrators' Bulletin No.2.

[48] See ACAS, Arbitrators' Bulletin No.1, Review of Arbitration Services.

[49] At the seminar in which this occurred, it was made clear to the arbitrator concerned, by ACAS officials, that this practice was not recommended and could prejudice the arbitration.

[50] Issues relating to terms of reference, reasons and recommendations will be discussed in subsequent chapters.

51 No seminars were held in 1990, because of financial constraints. The ACAS budget is tightly constrained and suffered additional pressure from the pay award achieved by civil servants. This was above the level allowed for in public expenditure targets which were based on a lower inflation rate.

52 The results of the surveys which are the subject of this thesis were also presented to arbitrators' seminars by the author.

53 See Appendix I, pp.76/80 for full development of this topic.

54 For example the 1984 miners' strike where the Prime Minister said in the House of Commons that whatever the cost it was worth it to defeat the miners.

CHAPTER 4

THE ARBITRATION PROCESS:
THE PARTIES, THE ISSUES AND THE HEARING

INTRODUCTION

In chapter 3 the selection and 'training' of arbitrators was examined. But, of course, there would be no arbitration and no third party intervention if there did not exist parties to a dispute. This chapter provides information on the parties who have used the arbitration service and the issues which were the subject of dispute between them. Through discussion of the terms of reference in arbitration, the question of what the arbitrator is actually asked to do by the parties is explored. Finally ACAS's involvement in preparing the parties for the hearing and the arrangements for the hearing itself will be assessed.

The objectives of this chapter are to ascertain whether there have been major changes in the participants, issues and terms of reference of arbitrations over the post-war period; and whether the state's role in the proceedings has altered over time.

A major part of the research was the analysis of the arbitration records available at ACAS Head Office dating from 1942. These took the form of written reports of the arbitrators including their awards. As has been discussed these records do not constitute public documents and the report and awards are deemed to be the property of the parties to arbitration. Although Concannon, [1986] and other arbitrators have the benefit of their own reports and awards on which to base their research, the present

study is the first systematic review and analysis of the records. Unfortunately it was not possible to examine background papers to the arbitrations as these are destroyed after a two year period[1].

A one in ten random sample of industrial relations arbitration cases was chosen from the reports of single and boards of arbitration, excluding the awards of the Central Arbitration Committee [CAC]. The objectives of the survey were; first, to identify the main users of arbitration; second, to examine the types of issues coming to arbitration and the extent to which these have altered over the period; third, to assess the extent to which arbitrators have been constrained when making their awards [that is, whether they have been asked to make a straight choice between the offer and the claim, or whether they have been free to exercise their judgement]; fourth, to ascertain whether or not arbitrators have given reason for their awards; fifth, to analyse the outcome of the awards themselves; and finally to evaluate whether or not the criticisms sometimes made of the system, for example that arbitrators always 'split the difference' or that arbitration is inflationary, are well founded. Objectives four, five and six will be analysed separately in Chapter 5.

The survey of arbitration awards was of major interest to ACAS staff involved with the collaborative project. It was of concern to ACAS officials that they should learn from past experience of arbitration and if possible dispel some of the myths and criticisms that are sometimes levied at this form of third party intervention[2].

i] Who Uses the Service?

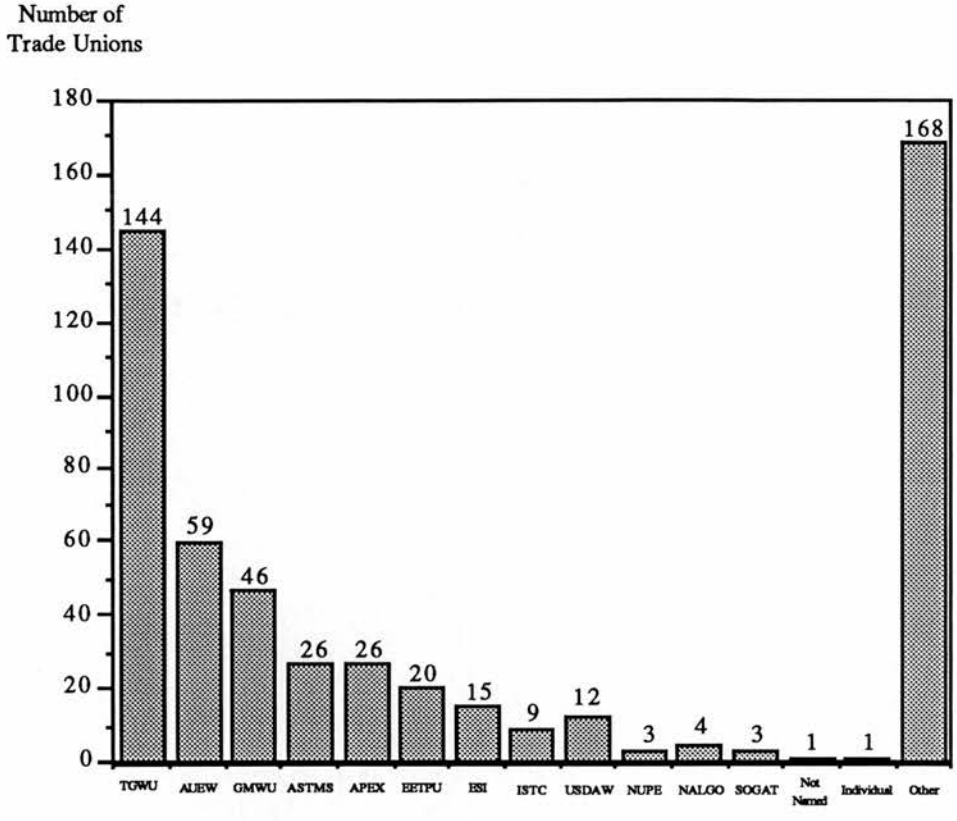
Given the influence of Jack Jones[3] in the setting up of ACAS, his role as a member of the ACAS Council and the size of the Transport and General Workers Union [TGWU], it is perhaps not surprising to find that the TGWU is the major user of the service. However, it is clear from the cases examined, that the TGWU had always been a significant user of the state's arbitration machinery long before the existence of ACAS[4].

Over the period examined from 1942-85, 27% of the cases involved the TGWU; 11% the Amalgamated Union of Engineering Workers [AUEW]; and 9% the General and Municipal Workers Union [GMWU]; with the other major users including the Association of Scientific, Technical and Managerial Staffs [ASTMS], the Association of Professional, Executive, Clerical and Computer Staff [APEX], the Electrical, Electronic, Telecommunications and Plumbing Union [EETPU], the National Joint Industrial Council of the Electricity Supply Industry [NJIC/ESI], the Union of Shop, Distributive and Allied Workers [USDAW], the Iron and Steel Trades Confederation [ISTC], the National Union of Public Employees [NUPE], the National and Local Government Officers Association [NALGO] and the Society of Graphical and Allied Trades [SOGAT] [see Figure 4.a]. Of the remaining 31% of cases a large number of unions were involved, from relatively well known unions such as the National Union of Seamen [NUS] and the Associated Society of Locomotive Engineers and Firemen [ASLEF] to less well known unions no longer in existence including the Scottish Horse and Motormen's Association [SHMA] and the Watermen, Lightermen, Tugmen and Bargemen's Union [WLTBU].

FIGURE 4.a

Main Trade Union Users of Arbitration 1942-85

[a one in ten sample]



Source: Brown, Survey of Arbitration Awards, 1942-1985 - See Appendix II.

The survey supports Concannon's findings [1978] that the largest single trade union user of arbitration services was the TGWU. While conceding that there could be a number of reasons for the extent of the TGWU's use of ACAS arbitration, Concannon argues that:

> "One is bound to come back to the clearly expressed TGWU policy of using ACAS arbitration as the main explanation of its present position as a 'user'."
>
> [p.18]

The evidence also supports Concannon's argument that the expansion in the number of cases from 1975 onwards can be accounted for by the increase in case input from the main trade union users, that is the TGWU, AUEW and ASTMS; and by the fact that more unions came into the arbitration system from 1974 onwards as the use of the service increased[5]. The figures show an increase in the use of arbitration in the 1970s by ASTMS, APEX, EETPU and the NJIC/ESI, but in relation to different issues. The ASTMS cases refer largely to grading issues in the universities; the APEX cases to grading issues brought to arbitration by the firm Massey-Ferguson; and the EETPU and NJIC/ESI cases to dismissal and discipline matters. The changes reflect the 'writing-in' of arbitration into collective agreements and procedures[6].

Therefore, one reason for the increase in ACAS's arbitration workload since 1975 can be traced to the writing-in of arbitration into procedures, but of course the decision to take this particular step also needs explanation. A number of inter-related factors could account for the increase including the establishment of ACAS itself and the perceived independence from government [particularly in relation to incomes policy]; the general economic and political climate in which trade unions had a greater role in government policy making and had benefited from the extension of trade union and workers rights; the encouragement of 'writing-in' as part of ACAS's policy[7]; the support for the service from prominent arbitrators[8]; or because of past favourable experience of using the service. The decline in the use of the service post-1979 could then also be explained by the suspicion that the service was no longer as independent or impartial as it had been; the withdrawal by the government of the right to proceed to arbitration from many groups in the public sector; the economic recession which led to increased unemployment and a decrease in industrial disputes; and the changing political climate which has been interpreted by some as anti-union.

As unions have adapted to changing economic and political circumstances in the 1980s and when the economy appeared to be recovering from recession, so 1989 was marked by an increase in the number of working days lost because of stoppages, major disputes about pay in the public sector and an increase in ACAS's arbitration workload[9]. As Table 1.1 illustrates the number of single and boards of arbitration cases increased from 127 in 1988 to 150 in 1989. The reasons given for the increase are reflected in a statement from the ACAS Annual Report 1989:

> "The most notable features of our arbitration and mediation activities in 1989 were an increase, for the first time for some years, in the number of requests received by the Service and the significant contribution made by this type of third-party assistance to the resolution of several complex and long-running disputes in the public sector. In the early years of the decade recourse to arbitration had declined, reflecting the changing climate of industrial relations and changes in procedural agreements in the public sector. Many of these had previously provided that either party had the right to refer unresolved issues to arbitration, binding the other party to the process and its outcome."[10]

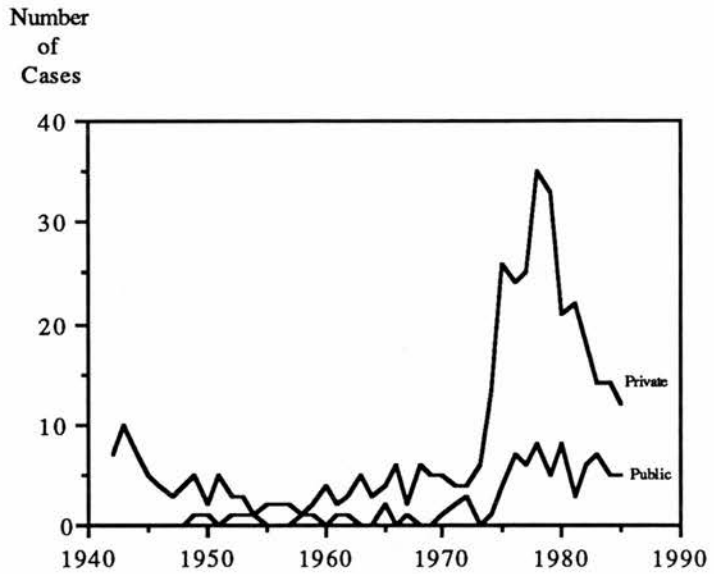
Distinction should also be made in the analysis of users between employers in the private and public sector. The survey of the users of arbitration, over the period 1942-85, reveals a division between private and public sector industries with 18% of cases in the public sector and 82% in the private [see Figure 4.b]. Some industries, for example steel, have moved in and out of the public sector over the years, and this was taken into account. In the future the privatisation programme of the Thatcher administrations is also likely to alter the balance of cases over time with a drop in public sector use as more nationalised industries are privatised. For example, a substantial number of dismissal and discipline cases are brought to ACAS arbitration by the electricity supply industry. At this stage it is unclear whether this procedure will remain part of the collective agreement for the industry after privatisation.

FIGURE 4.b

Use of Arbitration by Private and Public Sector Industries

in the period 1942-85

[a one in ten sample]



Source: Brown, Summary of Arbitration Awards, 1942-1985 - See Appendix II.

Attempts were also made to identify the categories of industries using arbitration, but this was not always possible as the arbitration awards gave insufficient information as to the type of company involved. Written reports for the earlier years in particular were very brief, in some cases as short as half or a quarter of a page. From general observations it is clear, however, that the industries using the service reflect the shift in employment patterns over the period, [for example from manufacturing to service industries]; and also the level of militancy of certain groups of workers at specific periods of time [for example car workers in the 1960s]. The earlier cases are dominated by references from the textile, steel, engineering, transport, food and chemical industries, while more recent users include

the education, banking, newspaper and television sectors. A major user of the service over the whole period was the food and drink industry, the alcoholic drink industry in particular being a source of many discipline cases.

The main users of arbitration then would appear to be those groups of workers with most developed bargaining structures who also play a prominent role in the Trades Union Congress [TUC]. The employers in the main are those who are party to national and local collective agreements, the majority of whom are in the private sector. The analysis of users also reveals no significant changes over the period except as a reflection of changing patterns of employment and economic conditions.

However, excluded from the figures are cases brought under the controversial Schedule II of the Employment Protection Act 1975. Schedule II operated from January 1977 until it was abolished by the Conservative government in 1980. Under this procedure trade unions could seek to improve the terms and conditions of employment of their members on the grounds of comparability by invoking certain standards set either at national or industry level or generally within an industry in a district. The introduction of Schedule II was controversial because it was brought into effect during a period of economic difficulties and pay restraint and was considered by some to be inflationary. The majority of these cases were heard by the CAC and accounted for a significant proportion of its work. Analysing the experience of the first two years of the CAC's involvement with Schedule II, Jones [1980] found that the engineering industry dominated the awards with 45 per cent of cases although it had represented only 17 per cent of employees. The other major user was the food, drink and tobacco industry with 10 per cent of awards. Although smaller groups of workers were the most prominent in the CAC awards, accounting for 57 per cent of awards for groups of workers of 50 or less and 74 per cent of the awards when the group size was 100 or less, they were in the main represented by the major trade unions including the AUEW, TGWU, ASTMS, APEX and GMWU [Jones, 1980, p.36].

In addition Section II of the Employment Protection Act 1975 [not to be confused with Schedule II] provided a procedure for dealing with trade union claims for recognition. ACAS was charged with the

duty of encouraging the settlement of the issue by agreement with the help of conciliation. If, on recommendation that a union be recognised, the employer refused to implement the recommendation, a provision for further conciliation existed. If the issue was still not settled, then the union had the right to make a unilateral claim to the CAC under Section 16 of the Act for the issue to be settled by arbitration. This procedure was similar to that recommended by the Donovan Commission which concluded that recognition questions should be handled by some new special tribunal which would not act as an arbitrator, but would operate more like a permanent Court of Inquiry [Lockyer, 1979, p.25]. Lockyer [1979] records that during the three years 1976, 1977 and 1978 ACAS did not refer a single recognition issue to arbitration under its voluntary arbitration arrangements, although it did settle a large number of recognition disputes through conciliation [p.24].

As with Schedule II, recognition disputes under Section II were a controversial topic and during 1978 and 1979 ACAS was challenged in the courts by both employers and trade unions over the discharge of its duties relating to trade union recognition[11]. The new Conservative administration of 1979 carried out its proposals to abolish the statutory procedure for trade union recognition. For the purposes of this survey, had the Schedule II and Section II cases been handled by the ACAS arbitration service, the balance of users would have been altered.

ii] The Issues which come to Arbitration

The next topic to be explored is the issues which parties refer to arbitration and the extent to which these have changed over time. The issues coming to arbitration are sometimes divided in the literature between issues of right or issues of interest. Lockyer [1979] defines the distinction between the two as follows:

> "An issue of Right involves the application of an agreement [interpretation of the past]....An issue of Interest involves the formulation of an agreement [decision for the future]."

Lockyer's definition is consistent with that adopted by Knoop at the beginning of the century as follows:

> "There are two distinct classes of labour dispute. The first class arises out of the interpretation of existing contracts. These disputes are generally individual, and are particularly suited for settlement by arbitration, if no settlement can be effected by any other method. The second class is caused by difficulties about the terms of future contracts, and these disputes are usually characterised by their collective nature."
>
> [Knoop, 1905, p.8]

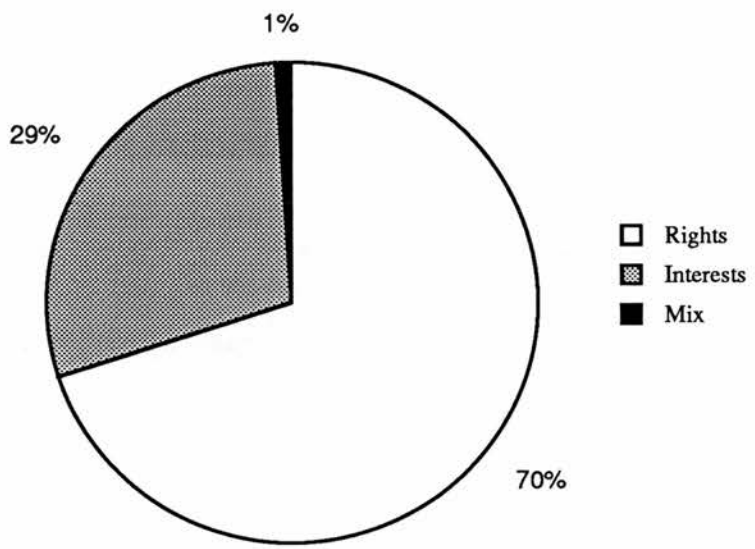
The distinction between right and interest cases is, however, not as clearcut as the definitions infer. What might appear on the surface to be a straightforward rights issue, could have implications for interests in the future. Also it would be misleading to categorise particular types of issues, for example grading, as always falling into the rights category. The majority do fall into this category, where the arbitrator is asked to decide, by examining the current agreement, whether a job should be classified grade A or B; but in other cases the arbitrator is asked to establish a new grading system, thus falling into the interest category. Figures separating cases between rights and interest issues should, therefore, be used with some caution. With these qualifications in mind, the distribution of issues has been categorised from the data as 70% Rights; 29% Interest and 1% Mix. The category 'Mix' refers to cases which include both rights and interests where the arbitrator was asked first to interpret the current agreement and then to settle a dispute over drafting of the new agreement.

FIGURE 4.c

Distribution of Issues between Rights and Interests

Arbitration Awards 1942-85

[a one in ten sample]



Source: Brown, Summary of Arbitration Awards 1942-85 - See Appendix II.

From Figure 4.c it can be seen that the majority of cases do fall into the rights category. Issues of right are often considered to be most appropriate for arbitration. For example, Lockyer states:

> "In many cases disputes about the interpretation of agreements fall back into the black and white category, where only one of two decisions is possible, and compromise is ruled out. Such disputes make good arbitrable issues and it is probable that, with the extension of the practice of formulating agreements in writing at plant as well as at national level, more disputes of this kind will be referred to arbitration. In this field, arbitration often plays a useful remedial role in removing ambiguities which found their way into written agreements when they were first negotiated."
>
> [Lockyer, 1979, p.31]

This view is supported by the statement from ACAS's previous Chairman, Sir Pat Lowry:

> "In my view the strongest case for a wider use of arbitration lies in the application and interpretation of rights already established by collective agreement. Many of these agreements are notoriously badly drafted and I question whether in the event of a difference of view it is always necessary to determine a correct interpretation by the use of industrial muscle."
>
> [Lowry, 1986, p.20]

More controversy has surrounded the use of arbitration in interest cases. It is likely that, although fewer in number, the interest issues will include the most complex cases involving national pay disputes and/or a substantial number of workers; and it is in these cases where the control exercised by the arbitrator is most subject to criticism. For example, arbitrators are often accused of 'splitting the difference'[12].

The distinction between rights and interest is a feature of the American model of arbitration and can be understood within the context of industrial relations in the USA. It is not common for trade unions and employers in Britain to distinguish between them[13]. In concluding his arguments for the use of arbitration to aid industrial change, Johnston states:

> "The terminology of 'rights' and 'interest' applied to disputes may be unhelpful, in that it tends to polarise discussion of appropriate industrial peace-keeping machinery. It may then be easier in Britain than in countries which do draw such a distinction to move in the direction of firmer institutional devises, such as arbitration, for reaching accommodations between the parties to collective bargaining."
>
> [Johnston, 1975, p.88]

Another way of categorising arbitration cases, other than on the basis of rights or interest, is in respect of the types of issues which are the subject of arbitration. It is this method which is used by ACAS in its Annual Reports.

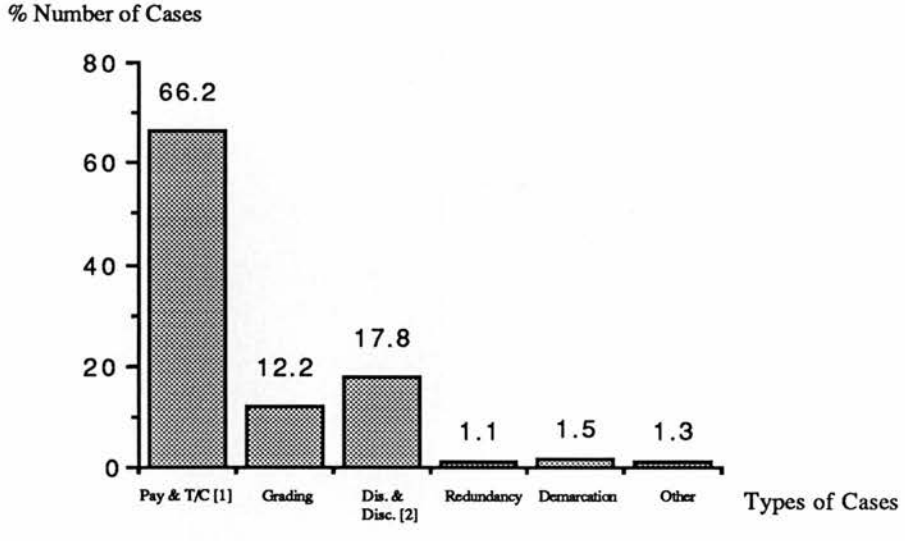
Over the period examined from 1942-85 very similar issues were the subject of arbitration cases, although some were time specific, for example disputes over war bonuses in the 1940s or equal pay for women in the 1980s. Pay and terms and conditions of employment accounted for 66% of the cases; dismissal and discipline for 18%; and grading for 12%. Other cases included redundancy or demarcation disputes and other trade union matters. Figure 4.d provides a break-down of the issues for the whole period.

FIGURE 4.d

Issues which were the subject of Arbitration Awards

In the period 1942-85

[a one in ten sample]



[1] Pay and Terms and Conditions of Employment.
[2] Dismissal and Discipline cases.

Source: Brown, Summary of Arbitration Awards 1942-85 - see Appendix II [b], pp.13/15.

A more detailed analysis of the figure [see Appendix II [b], pp.13/15] reveals that although issues relating to pay and terms and conditions issues dominated the awards for the years 1942-69, from 1970

there was a rise in the number of dismissal and discipline cases and also a significant increase in the number of grading issues. Again this could be a reflection of the writing-in of disputes over these issues into procedure agreements. In addition it is probable that the use of incomes policies in the 1970s could have resulted in an increase in requests for re-grading as a way of offsetting the effects of a pay pause or percentage increase; similarly the extension of dismissal rights for workers in the 1970s may have raised both awareness and confidence in taking cases to arbitration. With regard to dismissal cases, the increase may also reflect a dissatisfaction with aspects of Industrial Tribunal hearings [Williams, 1983 and Rideout, 1986]. Critics of the system drew attention to the level of legalism and the low level of reinstatement for employees who were unfairly dismissed[14]. Indeed the topic was debated within ACAS in the mid-1980s and the possibility of reforming the system and increasing the use of arbitration as an alternative was explored. The then Chairman of ACAS, Sir Pat Lowry, stated at a lecture on industrial relations:

> "I know that many employers and trade unions are concerned with the way in which the industrial tribunals have become submerged by what is loosely described as legalism. Arbitration can never become a substitute for the industrial tribunal procedure for the simple reason that any employee is always entitled to exercise his rights under the law. But there is nothing to prevent say a case of alleged unfair dismissal being first referred to arbitration - as indeed they are in the electricity supply industry. Once an arbitrator has pronounced in that industry, it is unknown for the issue to be referred to a tribunal for final determination. The arbitrator's award is accepted even if as it sometimes does, it requires the employer to vary the disciplinary penalty, eg, by suspension rather than by outright dismissal."
>
> [Lowry, 1986, p.21]

The possibility of extending the use of arbitration in unfair dismissal cases was also the subject of a paper and discussion at the ACAS Seminars in 1985[15]. One arbitrator [Concannon, 1980] has compared the differences between the two approaches, Industrial Tribunal and arbitration, to unfair dismissal, while another, Professor Rideout [1986] is a prominent advocate for the case of extending the use of arbitration in this area. In the event, the government did not fundamentally alter the legislation with respect to unfair dismissal and instead reforms were made to the Industrial Tribunal system.

Nonetheless, dismissal and discipline issues do account for a significant proportion of cases which come to arbitration especially in the post 1980 period[16]. If comparison is made between the figures for the whole period covered by the survey of awards and the 1989 distribution of issues, it is evident that pay issues have declined in percentage terms relative to dismissal and discipline and grading cases. Table 4.1 details the changes as follows:

TABLE 4.1

Distribution of Issues referred to Arbitration and Mediation

Comparison between 1942-85 period and figures for 1989

[a one in ten sample]

	1989		1942-85	
	No.	%	No.	%
Annual Pay	27	16	309	66
Other Pay and Conditions of Employment	34	20	[1]	[1]
Dismissal and Discipline	55	33	83	18
Grading	37	22	57	12
Others	4	9	18	4
Total	167	100	467	100

[1] Note that the figures for 'Other Pay and Conditions of Employment' are included in the figures for 'Annual Pay'.

Source: Brown, Summary of Arbtration Awards 1942-85 - see Appendix II.a, b and c and ACAS Annual Report 1989

Notwithstanding the decline in pay issues referred to arbitration over the period, pay still accounts for more than one-third of arbitration cases and these are the issues which receive most media attention especially if they result in actual or threatened industrial action. It is necessary to distinguish between annual pay claims and other pay and conditions of work. Many pay issues are not about annual pay claims, but are concerned with matters such as bonus payments and allowances, payment during strikes and holiday pay, and often involve small numbers of employees. However, what appears to be a relatively trivial issue on the surface may have implications for the future, or may be a symptom of other industrial relations problems at the place of work. These points were highlighted in the discussions between arbitrators at the 1986 seminars when case studies of actual arbitrations were examined. Nevertheless particular attention is given by the media to interest cases involving national pay disputes and it is the outcome of arbitrations on this issue which attracts most attention from critics and supporters of the service alike. The former on the grounds that arbitration results in inflationary pay awards by an arbitrator who gives little attention to economic conditions or the employers' ability to pay; and the latter in terms that arbitration is a preferable and more reasonable way of settling a dispute reducing the real costs to all those involved especially if industrial action is avoided. The results of the arbitration and the arbitrators' awards will be the subject of Chapter 5.

iii] What is the Arbitrator Asked to Do?: The Terms of Reference

A major debate in the 1980s concerning arbitration has related to the terms of reference given to the arbitrator at the outset of the case. The form which this debate has taken concerns promotion of what is described in the literature as flip flop, pendulum, final offer or straight choice arbitration. Under such arrangements the arbitrator is constrained in his or her remit to make an award either in favour of the company's last offer or in favour of the union's last claim. This differs from terms of reference which allow the arbitrator scope to make an award at some point between the claim and offer. Broad terms of reference do not, however, prevent the arbitrator from awarding in favour of either the claim or offer, or indeed from making an award below the company's offer[17]. An example of straight choice terms of reference is:

> "The arbitrator is asked to decide whether the 5.7% increase on basic salaries already awarded and implemented by the society is to stand or whether the claims by the Staff Association for an increase in basic salaries of 6% is to be met, the arbitrator to decide for one party or the other [ie 'pendulum arbitration']"[18]

In contrast an example of terms of reference which allow the arbitrator scope in determining his or her award is:

> "To determine the level of the 1985 pay award [as from 1 August 1985] for Meat Porters/Cutters employed at Stanley Meat Market, Liverpool, taking into account all relevant information submitted by Management and Union."[19]

Interest in straight choice arbitration grew in the 1980s partially as a response to one of the criticisms of arbitration mentioned above, that it was inflationary. Supporters of straight choice arbitration, in the main advocates of free market economics, mobilised opinion regarding the advantages of this procedure as an alternative to strike action by trade unions or a government imposed incomes policy[20]. By adopting straight choice between the claim and offer, it was argued that this encouraged the parties,

specifically the union, to be realistic in their claim. To make a claim which appeared to be excessive would run the risk of losing the arbitration without improving on the offer made by the employer.

Lewis [1990] summarises the policy debate on the advantages and disadvantages of straight choice arbitration as compared with 'conventional' arbitration as follows:

> "On the positive side, it is said to provide an alternative to strikes which overcomes the supposed defects of conventional arbitration, limiting the arbitrator's discretion, offering a strong incentive for settlement and encouraging closer and more reasonable positions if arbitration proves necessary. On the negative side, it is said that pendulum arbitration may founder on the difficulty of defining the parties' final positions, that it is unsuitable for complex disputes involving packages of proposals, and that it may be unfair and harmful to industrial relations where the parties' final positions are unsatisfactory and yet the arbitrator, deprived of flexibility, has to give total victory to one side."
>
> [Lewis, 1990, p.45]

Straight choice arbitration is often promoted in conjunction with other collective bargaining options designed to improve industrial relations, including so-called no-strike agreements or single union deals and in some cases compulsory arbitration is advocated as an alternative to industrial disputes [Burrows, 1986]. These developments are referred to in the literature as illustrations of 'new unionism' or the 'Japanisation' of British industrial relations on the grounds that the practices have their origin in Japan and have been imported into Britain through the collective agreements entered into by workers and management in Japanese owned plants [Bassett, 1986].

In analysing the cases coming to arbitration in the period 1942-85, the terms of reference were divided between four categories. 'Straight choice' - where the arbitrator was asked to decide between the last offer of the employer and the last claim of the union; 'judgement' - where the arbitrator was allowed to reach a decision between the offer and the claim if s/he wished or to award in favour of the union's claim or the company's offer; 'revoked, confirmed or varied' - a category which applies to a specific option in dismissal and discipline cases [mainly in the procedures of the electricity supply industry];

and 'split' - where the arbitrator was faced with two sets of terms of reference, one from the employer and the other from the union.

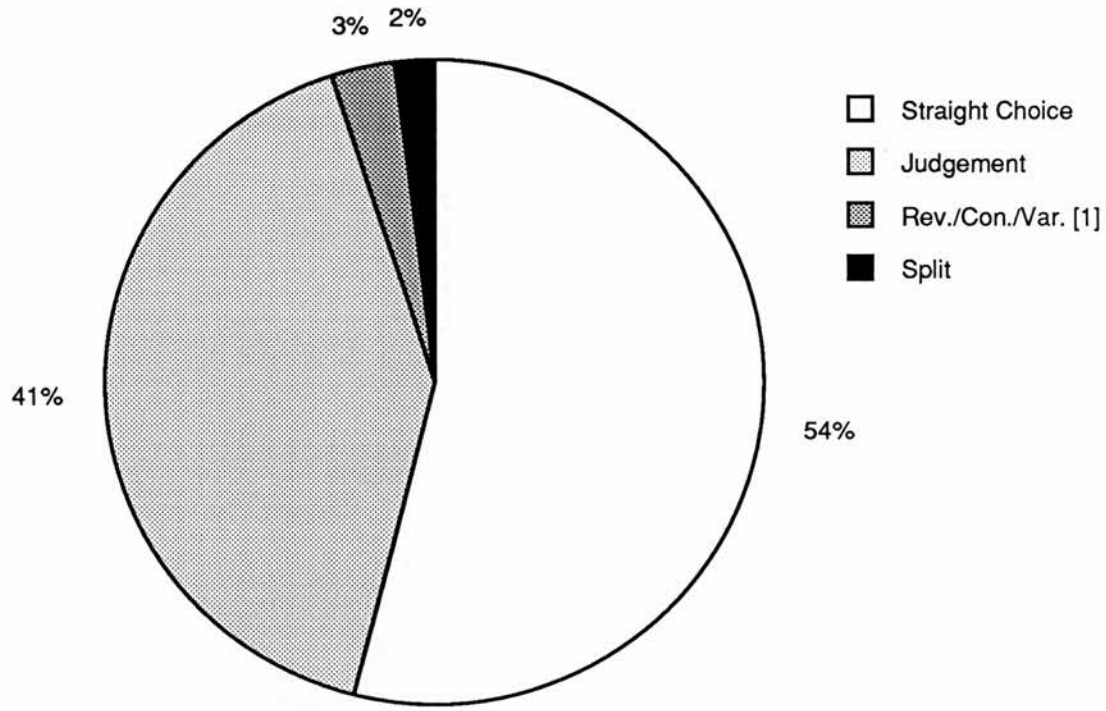
For all types of cases covered and over the whole period, the breakdown between the four categories was Straight Choice 54%, Judgement 41%, Revoked, Confirmed or Varied 3% and Split decisions 2% [see Figure 4.e][21].

FIGURE 4.e

Terms of Reference for Cases referred to Arbitration

In the period 1942-85

[a one in ten sample]



[1] Revoked, Confirmed or Varied - applies to dismissal and discipline cases only.

Source: Brown, Summary of Arbitration Awards 1942-85 - see Appendix II [b], pp.7/9.

Although the debate over straight choice arbitration has re-emerged in the 1980s, it is evident from the survey that straight choice [flip flop, pendulum or final offer] arbitration has been a feature of British industrial relations at least post-1942 and is not necessarily a development of the so-called Japanisation of industrial relations in 1980s. As Figure 4.e above illustrates, straight choice references account for over 50% of the cases examined in the survey. It should be noted, however, that although the debate

on straight choice surrounds pay issues, straight choice decisions have not been confined to pay, and indeed it is often contended that they are more appropriate for issues of right including a dismissal or grading issue, that is questions such as 'should an employee be dismissed or not'; or 'should the grade for the job be A or B'.

In addition, although it is acknowledged in the literature that straight choice has operated in relation to rights issues in the past, it is not normally acknowledged that it was practiced in relation to interest cases concerning pay. For the period examined, in issues concerning pay and terms and conditions of employment, 31% restricted the scope of the arbitrator to a straight choice decision, while 67% allowed the arbitrator to use his or her discretion [see Figure 4.f]. However, although arbitrators could have made a compromise award in 67% of cases, they did so in only 55% of cases; and arbitrators actually made a straight choice decision in 41% of the cases examined[22].

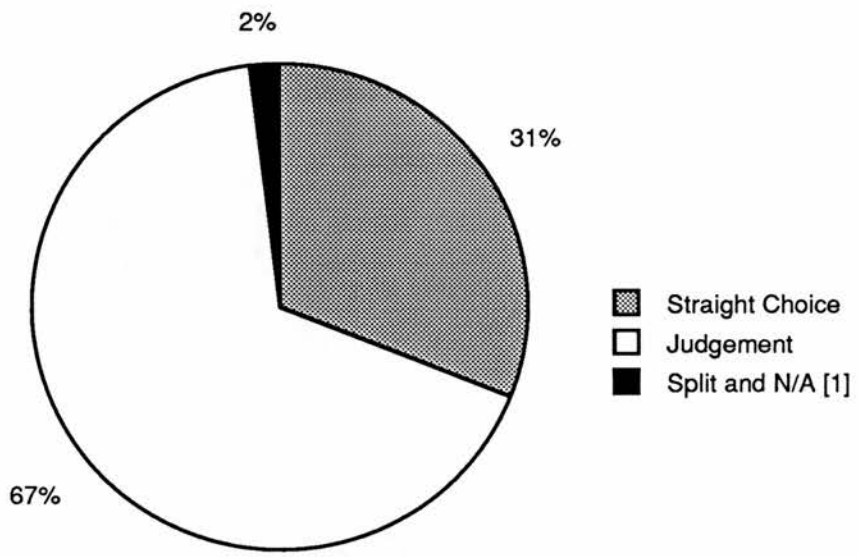
FIGURE 4.f

Terms of Reference for Cases relating to Pay

and Terms and Conditions of Employment referred to Arbitration

In the period 1942-85

[a one in ten sample]



[1] Applies to Split decisions and those cases which were non-applicable [N/A].

Source: Brown, Summary of Arbitration Awards 1942-85 - see Appendix II [b], pp.22/24.

A more detailed analysis of the overall trend for the period illustrates that for all issues, straight choice dominated the terms of reference at least until 1958 and for pay issues until 1950. However, because of the small sample especially of pay related cases, care should be taken in drawing conclusions from the figures. The figures show different trends at different periods of time and vary between all cases and pay related cases[23].

Another important factor to consider is that the cases up to the year 1958 operated under Order 1305 from 1940-51 and Order 1376 from 1951-1958. During these periods unilateral access to arbitration

was in existence and most claims were initiated by the union. The choice faced by the arbitrator, therefore, was to choose for or against pay claims made by the unions, as in most cases the employers did not concede that an increase should be granted. An example of the terms of reference operating at this time are:

> "To consider and determine the Union's claim as follows:
>
> [1] That the minimum rate be increased to 100/- per week with proportionate increase for skippers and enginemen.
>
> [2] That the present tonnage rate be increased by one penny per ton."

The arbitrator's decision in this case was:

> "After full consideration of the evidence submitted by the parties I find that the claim of the Union has not been established."[24]

However, the evidence from this present survey is not the earliest reference to the existence of straight choice arbitration in the literature. In a paper written by Treble [1984] entitled 'How new is final offer arbitration?', the author reveals that final offer arbitration operated in the British Coal Industry Conciliation Boards at the turn of the century. The Boards' Constitution provided, that in the event of no agreement being reached between the parties, an arbitrator should be brought in to give the casting vote.

> "There is one very important rule limiting the action of the independent chairman or umpire in his decision in regard to an increase or decrease of wages. It is that he has power only to decide for or against the proposals previously made in writing by one side or the other side ... Thus, if the workmen make an application for a 5 per cent increase of wages, and the owners reply offering an increase of 1 1/4 per cent, the chairman has no power to split the difference but must decide on one or the other."
>
> [Jevons [1915] quoted in Treble, 1984]

Treble notes, however, that not all Boards interpreted their constitutions in this way. For example, in Scotland arbiters exercised their judgement in reaching an award, while in the Federated Area, South Wales, Durham and Northumberland the arbitrators interpreted their task as deciding between the final offer or the final claim of the parties. With the exception of South Wales, the final offer interpretation was changed - in Durham and Northumberland at the first opportunity and in the Federated Area after a number of years. Changes to the constitution were largely as a result of pressure from the arbitrators themselves. For example, one arbitrator expressed his dissatisfaction with the constraint imposed on him:

> "I suggested that I thought it would be advantageous in our proceedings if you would allow some elasticity of decision in the Chairman beyond saying 'Yes' or 'No' to a hard and fast proposition I would tell you at once that it would be very much more acceptable to me if, instead of moving to take off 10% in one motion, you would move to take if off in two motions - that is, two separate motions - the 5% of January to be taken off, and the 5% of October to be taken off, so that if it should be thought that 5% ought to come off instead of 10% or even 7 or 8% instead of 10%, I should have more opportunity of arriving at the exact state of wages I thought should exist."[25]

Treble makes reference to Jevons [1915] to identify the first claims of the so-called superiority of final offer arbitration. The advantages cited are that the chairman has no power to compromise or 'split the difference' between the claim and offer; it is more likely to result in reasonable pay demands from unions; the offer and the claim are less likely to differ widely; much of the work is undertaken before the parties come to the arbitrator; and one side is always satisfied [the converse, of course, is that one side is always dissatisfied].

Treble states that the experience of the coal miners of Great Britain with final-offer arbitration was mixed. In some areas they abandoned final-offer arbitration very quickly while in South Wales and the Federated Area, the experiment continued for some time. He concludes that:

> "It is a striking feature of the records that the parties to the negotiations seem to have been uniformly indifferent as to the voting powers of the arbitrator. It was always the arbitrator himself who raised objections to it."
>
> [Treble, 1984, p.25]

The debates over the advantages/disadvantages of final offer arbitration in the early 1900s are extremely similar to those being expressed in current industrial relations debates. Some arbitrators consider that in pay claims final offer arbitration is unsatisfactory. For example, Sir John Wood [1985] highlights some of the disadvantages of last offer arbitration including the problem of determining the 'last offer' and the 'last claim' and subjecting what are often complex and complicated cases involving a number of issues to final offer decisions. Sid Kessler's paper to the 1985 arbitrators' seminars discussed the difficulties involved from an arbitrator's point of view in taking such a case, particularly when [as was his experience in a final offer case] the parties themselves hold different views over the interpretation of the pendulum arbitration clause in their agreement and thus had different expectations of the outcome. Roy Lewis [1990], also drawing on his experience as an arbitrator, argues that pendulum arbitration "can be less conducive to the sensible resolution of disputes than more open forms of arbitration." [p.50]. Although proposals for final offer arbitration especially for 'essential services' in the public sector have been mooted along the lines of those operating in North America, Lewis contends:

> "These proposals are open to challenge on grounds of policy, practicality and economic cost, and pendulum arbitration is itself problematical. A pragmatic reform of dispute resolution procedures in essential services might include the option of pendulum arbitration in appropriate cases, but only as part of a flexible and sensitive approach to third-party intervention."
>
> [Lewis, 1990, p.50]

Reservations about the operation of final offer arbitration from non-arbitrators are also to be found. For example, using case study material, Webb [1990] examined the feasibility of final offer arbitration as a method for the resolution of industrial disputes in the public sector. She argues that although final offer arbitration may have a role in relatively simple cases, it is likely to be unworkable, if not harmful to industrial relations, in complex disputes:

> "It is unrealistic to expect an external third party to produce a definitive resolution of disputes which constitute a major conflict about the appropriate frame of reference to be used in determining the value of subsequent concessions. Consequently the use of final offer arbitration in such cases is likely to go severely wrong unless there is a method for distinguishing between disputes which are amenable to adjudication and those requiring something more akin to mediation."
>
> [Webb, 1990, p.124]

Advocates of straight choice arbitration are to be found amongst arbitrators, economists and proponents of free market economics such as the Institute of Directors [IOD]. Supporters of straight choice arbitration often argue that it should be instituted as a substitute for strike action [especially in the public sector] and/or as a substitute for 'conventional' arbitration which they consider to be open to criticism. Ramsumair Singh [1986], one of the arbitrators on ACAS's panel, examined the strengths and weaknesses of final offer arbitration in relation to conventional arbitration. He concluded that final offer arbitration had much to commend it, both in theory and practice, especially if mediation was involved as an integral step, and that its use in the public sector should be explored further. Professor James Meade's proposal for a 'not quite compulsory arbitration' policy and the setting up of an arbitral body which would be restricted to final offer arbitration is analysed by Minford and Peel [1983]. Although criticising the proposal on the grounds that it stipulates that the primary determinant of pay should be on the basis of promotion of employment, the authors argue the case for final offer arbitration in restricted circumstances:

> "notably to prevent strikes in sensitive areas of continuing public sector monopoly and transitionally to enforce interim settlements in labour markets where a Monopolies Commission has produced a damaging report, to be carried out over a period."
>
> [Minford and Peel, 1983, p.15]

It is interesting to note the current demand from some employers, such as those represented by the IOD, for compulsory arbitration in the 1980s and support for final offer arbitration. One IOD publication records:

> "Many employers are concerned that we are witnessing a resurgence of the 'British disease'...."We wish to see, as part of the procedure in the essential services, the including of compulsory and binding arbitration...."We would welcome further discussion on the concept of final offer arbitration with a view to considering how this idea could fit into the pattern of British industrial relations."
>
> [Institute of Directors, 1984, pp.1/2]

In contrast, in the different economic climate of the 1950s, that is during the period of full employment and when unilateral access to arbitration was available under Orders 1305 and 1376, employers at the time considered this procedure to be inflationary and to give excessive power to trade unions[26]. This change of attitude on behalf of some employers provides some insight into the relationship between the balance of power between the parties at any given time and the economic conditions under which they are operating. In the economic recession of the 1980s, some employers at least considered they had something to gain by promoting unilateral access and straight choice arbitration.

Given these different views on the use of final offer arbitration, it is useful to examine the impact of the debate on the approach and policy of ACAS and its officials. In a speech delivered in 1986, Sir Pat Lowry, the then Chairman, stated:

> "ACAS has been accused of being opposed to final offer arbitration. This is not the case. We are rightly questioning of any industrial relations nostrum that is marketed as if it had all the qualities of Dr Collis Browne's famous panacea. But we very much welcome change and experimentation and, speaking personally, I would very much like to see one or two of those public sector problems to which I referred earlier being referred by joint agreement to final offer arbitration."
>
> [Lowry, 1986, p.19]

The pros and cons of final offer arbitration have also been debated at ACAS seminars, and Bamber [1987] states that at ACAS arbitration seminars, at least six possible disadvantages of pendulum arbitration were identified[27]. However, in its Bulletins to arbitrators, ACAS has included references to the use of pendulum arbitration, but has restricted its comments to factual reporting of the case and the outcome of the arbitration[28].

The Annual Reports of ACAS and the CAC [1984] discussed the concept of straight choice arbitration and imply that this form of arbitration is normally reserved for rights issues. Both reports, therefore, under-estimated the use of straight choice arbitration in interest cases in the past. The 1989 ACAS report outlines ACAS's current views on the issue as follows:

> "In 1989 there was renewed awareness of the potential benefits of arbitration and mediation, including a public debate about the value of 'straight choice' or 'Pendulum' arbitration. Here, in the event of a final failure to agree, management and unions are committed to accept the decision of a third party who resolves the difference by choosing one or other of the two competing propositions advanced by them. The general concept is, of course, far from new, and where non-pay issues are concerned has been used over many years. In pay matters, however, its advantages are less clear because of the possible effects it can have in inhibiting negotiations, or establishing concepts of winning and losing. We noted few new procedural agreements in 1989 which provided solely for pendulum arbitration."
>
> [ACAS Annual Report, 1989, p.25]

When asked in the questionnaire if they considered there was wider scope for the use of straight choice, flip flop or pendulum arbitration, a substantial number of arbitrators, 22, answered yes to this question and a further 6 arbitrators said yes with certain conditions[29]. From Table 4.2 below, it is clear that there is no consensus of view between the arbitrators as to the present or future use of straight choice arbitration.

TABLE 4.2

Views of ACAS Arbitrators on

Wider Scope for Use of Straight Choice Arbitration

Response	Number of Arbitrators
Yes	22
Yes, with certain conditions	6
No	15
Parties should decide	4
Depends on circumstances of the case	4
More research needed before deciding	2
No decided views	2
Don't know	5
Question unclear	3
No response	7
TOTAL:	70

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I, p.46.

However, when asked if they preferred to make a straight choice in favour of one side or the other, only 10 arbitrators answered yes to this question. Fourteen arbitrators were against such an option and 23 said they had no preference as it depended on the circumstances of the case [see Table 4.3].

TABLE 4.3

Preference of ACAS Arbitrators for Straight Choice Terms of Reference

Response	Number of Arbitrators
Yes	10
No	14
No preference - depends on the circumstances of the case	23
A matter for the parties, not the arbitrator to decide	2
Only when parties require it	6
Occasionally	4
Central question is to make an acceptable award and resolve the dispute	5
Cannot give a simple answer - dangers in making a straight choice	4
No response	2
TOTAL:	70

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I, p.45.

The views of the parties to arbitration on this issue were also sought. In the questionnaire issued to employers and trade unions, they were asked, in the event of a dispute proceeding to arbitration, whether their procedure agreements placed specific restrictions on the arbitrator's terms of reference. Sixteen respondents answered yes to this question stating that the arbitrator can only decide either for the employer's or for the union's final position [straight choice arbitration]. In a further 8 cases there

were other restrictions on the scope of the arbitrator's decision. In the majority of cases, 91, the arbitrator was free to award as s/he thought appropriate [see Table 4.4][30].

TABLE 4.4

Procedure Agreements of Parties to Arbitration 1988 where ACAS Arbitration is Required or Permitted

[Excluding ESI Cases]

	Responses	
	Number	%
Yes, the arbitrator can only decide either for the employer's or for the union's final position [straight choice arbitration]	16	11.1
Yes, there are other restrictions on the arbitrator's decision	8	5.6
No, the arbitrator is free to award as he/she thinks appropriate	91	63.2
No response	29	20.1

Source: Brown, Survey of Parties to ACAS Arbtration 1988, see Appendix III, Question 7[c].

When asked about the specific cases which had gone to arbitration in 1988 in which they were involved, 39 respondents said that the arbitrator was restricted under the terms of reference to a straight choice decision; 14 that the arbitrator was restricted in other ways; and 90 said the arbitrator was free to award as s/he thought appropriate [see Table 4.5]. The perceptions of the parties to arbitration did not always coincide. For example, 38 management representatives considered that the arbitrator was free to award as s/he thought appropriate, compared to 52 trade union representatives[31].

TABLE 4.5

Terms of Reference in ACAS Arbitration Cases 1988

[Excluding ESI Cases]

	Responses	
	Number	%
The terms of reference require the arbitrator to choose the employer's or the union's final position	39	27.1
The arbitrator was restricted in other ways	14	9.7
The arbitrator was free to award as he/she thought appropriate	90	62.5
No response	1	0.7

Source: Brown, Survey of Parties to ACAS Arbtration 1988, see Appendix III, Question 12.

It is interesting to compare what the parties thought the arbitrator was asked to do with the actual outcome of the arbitration. Although in over sixty per cent of cases they thought the arbitrator was free to make a compromise award between the offer and the claim, when the parties were asked about the outcome of the arbitration only 37 respondents [25.7%] perceived that the arbitrator had made a compromise award[32]. Therefore, even when a compromise decision is available to the arbitrator and pendulum arbitration is not imposed on him or her in the terms of reference, there is evidence to suggest that arbitrators are not opposed to making straight choice decisions, as the evidence from the survey of the arbitration awards also indicates[33].

One of the reasons for exploring the terms of reference of arbitration is that they set out the boundaries of proceedings within which the arbitrator can operate; and especially if restrictions on the scope of the arbitrator are included, can limit the power of the arbitrator. It is customary for the terms of reference to be agreed between the parties before the case can proceed to a hearing. In exceptional cases where the parties are unable to agree terms of reference, the arbitration may proceed with two separate terms of reference, but this is unusual and not recommended by ACAS staff. Some procedure agreements, like those for the electricity supply industry and some of the new so-called 'no strike' agreements, specify the terms of reference in advance. Although in theory the parties should draft the terms of reference, the conciliation service provides assistance with their preparation:

> "the conciliation branch of ACAS is always prepared to assist with the preparation of terms of reference and it is a good idea to make use of the service offered by these experienced conciliators."
>
> [Lockyer, 1979, p.56]

It is common, therefore, for a conciliation officer to be involved in drafting the terms of reference, particularly if the dispute has been the subject of conciliation before proceeding to arbitration. It is considered essential that the arbitrator's terms of reference are unambiguous and as far as possible address the key issue of the dispute. If the terms of reference are unclear, or if the parties to the dispute hold different interpretations of the terms of reference, this could result in difficulties during the arbitration hearing and over the acceptability of the arbitrator's final report and award. Referring to practice in the 1970s, Lockyer states:

> "The arbitrator's terms of reference set out the question which he is required to answer and is of fundamental importance - ask a silly question and you are liable to get a silly answer. An ACAS survey carried out in 1976 showed that in a large proportion of those few cases where difficulties arose in the later stages of arbitration there was some defect in the terms of reference. The importance of preparing proper terms of reference cannot be emphasized too strongly."
>
> [Lockyer, 1979, p.54]

In order to reduce the problems associated with poorly drafted terms of reference, ACAS has developed their staff training programme for conciliation officers to include instruction and advice from arbitration staff on this and other subjects associated with arbitration[34].

The more direct role played by conciliation officers in drafting terms of reference appears to contradict evidence given by one of the Ministry of Labour's witnesses to the Donovan Commission. When asked by George Woodcock: "What are the terms of reference you give in arbitration cases?", the official replied: "The terms of reference are given by the parties to the arbitration.". When pressed with the question: "Do you think the Ministry might in giving terms of reference to Arbitration Tribunals look perhaps more closely than they have done in the past?", again the official replied: "At present we are entirely in the hands of the parties because we cannot refer to arbitration except with the agreement of the parties and in practice they determine their own terms of reference.". The response from George Woodcock was "I cannot believe you are as neutral as all that."[35].

It would appear that either ACAS policy is different from that operated by government officials in the Ministry of Labour: and/or ACAS officials are now less coy about their role than their Ministry of Labour counterparts. Les Parsisson's view is that ACAS policy on terms of reference does not necessarily contradict what was said by the Ministry of Labour official in his evidence to the Donovan Commission. After the establishment of ACAS a more 'positive' policy was adopted in conciliation including drafting terms of reference, but ultimately the terms of reference are set by the parties to arbitration[36].

In their first Bulletin to arbitrators, ACAS records that there was general satisfaction expressed by arbitrators with the quality of terms of reference presented to them:

> "This reflected well on conciliators who played an important role in ensuring that, as far as possible, the terms accurately defined the issue and indicated, without ambiguity, precisely what was expected from the arbitrator."[37]

Arbitrators were informed that to minimise any future problems with terms of reference, two changes in practice were to be adopted. First that conciliation assistance would be offered in advance of the hearing "so that terms of reference and other arrangements for arbitration could be clarified and mutually agreed"; and second that in cases going straight to arbitration without conciliation "arbitrators should adopt, as a matter of routine, the practice of checking and clarifying the terms of reference with the parties immediately before hearings start."[38].

In the induction seminar for arbitrators held in 1983, the senior arbitrator present stated that the preparation of the terms of reference was largely the conciliator's job and noted that "the degree of professionalism in this area and others has increased very significantly in the last few years.". He went on to argue that "you do not want to exceed your terms of reference" before offering practical advice on clarifying the terms of reference with the parties before proceeding with the hearing[39].

Oral evidence from the seminars held by ACAS for its arbitrators would indicate that every effort is made to encourage arbitrators not to stray beyond the terms of reference actually set out for them by the parties. To do so, it is argued, again runs the risk of prejudicing the proceedings at the hearing and acceptability of the award. ACAS officials were pressed in discussion by arbitrators about exceeding the terms of reference when, during the hearing, it becomes evident that there is an underlying issue which needs to be addressed but does not form part of the formal reference. Their response was that, although this was not recommended, there may be few occasions when it was possible as long as the parties were both agreeable. In reply, one arbitrator commented that in such an event:

> "I stifle my temptation to play God - my loyalty to you above my sense of justice."[40]

The final acceptability of the award, which is morally and not legally binding, and the avoidance of another dispute, therefore, play a crucial part in the attitude of officials to the terms of reference and constraint on the arbitrators.

Although, as indicated, the conciliation officer may have a key role in assisting the drafting of the terms of reference, the role of the parties themselves should not be underestimated. Depending on the complexity of the case and the relative experience of the parties to arbitration, drawing up the terms of reference can also be the subject of some negotiation between the parties. In this sense, this stage can be viewed as a continuation of the bargaining process. The process is then extended to the preparation for and proceedings at the hearing.

iv] Preparation for the Hearing

It is usual for written statements of the case prepared by the parties to be exchanged and then submitted to ACAS for transmission to the arbitrator before the hearing:

> "This [the written statement] should be as clear and complete as the parties can make it with the resources available to them since good written evidence helps the arbitrator[s] to form a clear picture of the situation and the problem in advance of the actual hearing. This may also help the parties to make their oral statements at the hearing itself."
>
> [Lockyer, 1979, p.133]

To assist the parties in the preparation of their written statements, ACAS issues a leaflet entitled 'Notes for guidance on the preparation of written statements of case for arbitration'. The leaflet sets out the benefits of preparing a statement and reassures the parties that, where they have already been involved in conciliation, the arbitration will not be influenced by previous events:

> "Conciliators do not reveal what is said to them during the conciliation process because these discussions are regarded as confidential. Where arbitration follows conciliation the conciliator will have full knowledge of the issues and of the general circumstances of the dispute, but the arbitrator will not. Arbitrators come to each case with a completely fresh mind."
>
> [Lockyer, 1979, p.134]

Given this statement made by Lockyer in 1979, the stress made on the preservation of the separate integrity of the conciliation and arbitration stage by ACAS officials at the induction and other arbitrators' seminars can be understood.

Advice is given by ACAS officials on the content, layout, timing and exchange of papers. The parties are encouraged to keep their statements as brief as possible but to include information on the history and background of the dispute; background information about the company including its products and union representation; the arguments supporting or opposing the claim; and a brief summary of the case highlighting the key point which the arbitrator is being asked to consider [Lockyer, 1979].

In the questionnaire survey of the arbitrators they were asked if they found the written statements of the parties to be satisfactory. They responded as follows:

TABLE 4.6

ACAS Arbitrators' Satisfaction with

Written Statements of Parties to Arbitration

Response	No. of Arbitrators
Yes	49
No	7
Generally	12
Other Comments	2
TOTAL:	70

Source: Brown, Questionnaire Survey of ACAS Arbtrators - see Appendix I, Question 13 [b], p.37.

There was some indication that arbitrators found the trade union statements less satisfactory than those of employers. For example, of the arbitrators responding 'Yes' to the above question, 8 stated that the trade union statements tended to be less satisfactory. Of those answering 'Generally', 5 were less satisfied with the trade union statements and one arbitrator who answered 'No' to the question specifically mentioned that the trade union statements were unsatisfactory[41].

In discussions with arbitrators at seminars, there was some sympathy expressed for trade union officials in preparing written statements, as it was considered that employers were more likely to have the skills and ready access to the resources necessary to produce satisfactory written statements. It was argued by the arbitrators that in most cases the oral submissions of the trade union representatives compensated for any defects in their written statements. Experienced arbitrators commented that they

learned not to pre-judge a case from the written statements as often their initial response to these papers was overturned by the events and evidence from the hearing.

The assistance given by ACAS officials to parties in preparation for the arbitration hearing can be viewed as an additional method of improving what they describe as the professionalism and efficiency of the service. Such procedure also reduces the time of the hearing in dealing with background information and, it can be argued, increases the possibility of smooth running of the hearing. It can also enhance the confidence of the parties if they are made aware that the arbitrator has acquainted herself or himself with the facts of the case[42]. This in turn is likely to have a positive effect on the acceptability of the final award. Thus the officials do exercise a degree of control over the process through procedural conventions built up over time. As Webb [1982] observes this has implications beyond improving professionalism and efficiency:

> "The formality of proceedings independently of who has control over the decision, can be used to ensure a narrow definition of the issue and function to exclude personal hostilities; both may be necessary to achieve at least temporary resolution of the dispute."
>
> [Webb, 1982, p.75]

v] The Arbitration Hearing

Procedure conventions also surround the arbitration hearing itself. As in most dispute situations time is an important factor, every effort is made to arrange a hearing as soon as is practicably possible. ACAS officials endeavour to set up a hearing within three weeks of instruction. Delays may, of course, occur because of diary commitments of the parties and potential arbitrators. Delay in the process was one criticism mentioned by a small number of parties in the questionnaire survey:

> "My major criticism is that from the appearance of the problem to the final award can be a very long time."[43]

While acknowledging that the parties should not experience any unnecessary delays, the response of arbitrators and ACAS staff to this criticism was that resolution of the dispute through arbitration is likely to be considerably quicker than letting the problem continue unresolved. Also the time involved has to be seen in relative terms to the time already expended by the parties in the dispute before the reference to arbitration was made[44].

The venue for the hearing can either be the employer's offices or workplace or the hearing can take place on neutral ground, most commonly at ACAS premises in the regions or Head Office. ACAS arbitration staff are then available to assist the parties and aid the smooth running of the hearing. For example, there is an increasing trend for secretaries [ACAS officials] to assist an arbitrator by taking notes of proceedings, summarising submissions and preparing the first draft of the report, especially in complex cases.

The parties are normally represented by those people involved at the earlier stage of negotiations. The employer's side will almost certainly include members of line management and those responsible for industrial relations and the trade union side will be represented by full-time officials and shop stewards. It is unusual for the parties to have legal representation and this is discouraged. Lockyer [1979] refers to a statement made by Sir Roy Wilson QC in his evidence to the Donovan Commission that he had: "never seen any indication that the other side, whether it be the workers' side or the employers' side, had felt that they were being put to an unfair disadvantage" when the other side had legal representation. Perhaps this is the perception of someone fully acquainted and familiar with legal proceedings, because Wilson's view conflicts with the oral evidence obtained from arbitrators' seminars and from an actual arbitration case, where the 'other side' did feel very much at a disadvantage when the employer brought along a legal representative. Also the involvement of a lawyer representing either of the parties was not welcomed by the arbitrators themselves[45].

In keeping with the historical tradition of British industrial relations, stress on the non-legality of the process is reinforced in the arrangements and procedure of the hearing where efforts are made to keep proceedings as informal as possible. Commenting on practice in the 1970s, Lockyer states:

> "The arbitration hearing is also always informal It is not a judicial occasion, statements are not taken on oath and the parties invariably sit when making them. Arbitrators do their best to put everyone at their ease and to conduct the hearing in as relaxed an atmosphere as possible."
>
> [Lockyer, 1979, p.67]

Oral evidence obtained as part of this research project confirms that this policy continues to be carried out in practice.

At the outset of the hearing, it is the arbitrator's job, in addition to clarifying the terms of reference, to clarify the procedure s/he proposes to adopt. The normal procedure is for the arbitrator to allow the parties to present their case before questioning them on any points:

> "the arbitration procedure makes use of various methods of obtaining information. It uses the 'adversary principle' in as much as the arbitrator obtains information by listening to the arguments of the contending parties and it also uses the 'inquisitorial principle' or 'truth theory' to the extent that the arbitrator closely questions the parties to obtain information."
>
> [Lockyer, 1979, p.69]

Ninety-five per cent of the parties to arbitration surveyed in 1988 agreed that the arbitrator had allowed them sufficient time to state their case and ninety-four per cent considered that they had sufficient opportunity to question the other party[46].

Finally the parties are allowed the opportunity to sum up their respective cases before the end of the hearing. Some arbitrators also take the opportunity to summarise the issues and arguments as s/he understands them at this stage.

No decision is made on the day of the hearing - at least none is transmitted to the parties. Instead on completion of the hearing the arbitrator informs the parties that they will receive her/his decision in writing within two to three weeks. One arbitrator describes his feelings at this stage of the process as follows:

> "Arbitrators delude themselves if they imagine that disputes are passed to them because parties lack skill to resolve their problems on their own. The arbitrator is not infrequently a whipping boy, and at the end of many an arbitration hearing it is the arbitrator who retires with the weight of the glum world on his shoulders and with a decision to be made, while the parties, having passed the buck, may depart together With peace and consolation ...And calm of mind, all passion spent!"
>
> [Johnston, quoted in Lockyer, 1979, p.76]

Summary

As has been discussed above, there is a remarkable degree of continuity over a number of key issues in arbitration. First, the users of the service have not altered fundamentally over the period examined.

Second, the issues coming to arbitration have also remained similar although the relative distribution of the issues coming to dispute have changed over time. As indicated this can be accounted for by the writing-in of arbitration into procedure agreements in some industries. As a significant element of the dismissal and discipline cases are referred by the electricity supply industry under their current agreement, it remains to be seen to what extent these procedures will be affected by the privatisation of the electricity industry. In the absence of increased use of the service from other sources or for different reasons, discontinuation of these cases will significantly reduce the arbitration caseload.

Third, it has been illustrated that straight choice arbitration is not a new phenomenon in British industrial relations and that the degree of control exercised by the arbitrator over the arbitration can and

has been restricted by the terms of reference. ACAS and its officials do appear to play a more direct role, however, in establishing the conventions surrounding the drawing up of terms of reference.

Finally, the role of establishing procedural conventions has also been extended in relation to the preparation for the hearing and the hearing itself. These conventions are reinforced through the information issued to the parties and the bulletins and seminars for arbitrators.

The outcome of the process will be explored in Chapter 5.

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1 There are two types of files held by ACAS, policy files which are registered by registry and section files which include those used for arbitration applications. After two years the arbitrators' reports and awards are bound into volumes and the background papers are destroyed. Neither the Department of Employment nor ACAS Registries have any interest in these non-policy files. Similarly they are not kept by the Public Records Office. This information was obtained from a senior civil servant involved with arbitration who stated that the lack of space necessitated this practice.

2 The results of this survey are summarised and contained in the attached three schedules of awards for the years 1942-1985 for single and boards of arbitration and also the separate schedules for the dismissal and discipline cases for the period 1974-85 for single and boards of arbitration - see Appendix II a, b and c. A summary of the results was presented to the 1986 arbitrators' seminars together with summaries of the schedules referred to. A similar paper was prepared for the ACAS Council meeting in January 1987.

3 Jack Jones was General Secretary of the TGWU and was instrumental in the setting up of ACAS. Because of his role in industrial relations and the Social Contract with the Labour Government in 1974-79, it was often contended that Jack Jones was one of the most, if not the most, powerful men in the country. Such an interpretation of events often coincides with the thesis that trade unions in the period had excessive power. For reference to this view of Jack Jones, see, for example, Coates, 1989, p.85 and MacInnes, 1987, p.45.

4 See pages 4/6 of Appendix II [b].

5 Ibid.

6 Reason given by ACAS officials for the increased use of arbitration by the unions quoted.

7 See Chapter 3 in relation to selection and 'training' of arbitrators when ACAS's policy in this matter was discussed by an ACAS official.

8 For example, arguments advanced by Professor Tom Johnston [1975] for the increased use of arbitration in British industrial relations.

9 Lowry, 1990 [b]; and speech by the new Chairman of ACAS, Douglas Smith, to the Arbitrators' seminar in November 1989.

10 ACAS Annual Report, 1989, p.25.

11 The most publicised case related to a dispute at Grunwick where the House of Lords decided that an employer was under no legal obligation to cooperate with ACAS even though this might make it impossible for the Service to carry out its statutory functions in some cases - see discussion in Lockyer, 1979.

12 Evidence from the analysis of arbitration awards [see Appendices I, II and III and discussion in Chapter 5] would indicate that the criticism that arbitrators always 'split the difference' is unjustified. This is one area where ACAS was interested in the survey of arbitration awards.

13 See discussion in Webb [1982] and distinction between statute law and common law models of bargaining.

14 See discussion in Dickens et al [1985] regarding satisfaction with the industrial tribunal system and Concannon [1980] for comparison between industrial tribunal and voluntary arbitration approaches to unfair dismissal.

15 A paper entitled 'What Went Wrong with Unfair Dismissal' was presented by one arbitrator, Professor Rideout, to the Arbitrators' seminars in 1985. The paper was then the subject of discussion at the workshops.

16 From the survey of arbitration awards it was evident that a large proportion of dismissal and discipline cases were arranged for the NJIC/ESI. Since 1980 these cases have accounted for an increasing percentage of the total dismissal and discipline cases from 30% in 1980 to 67% in 1985.

17 For further discussion of arbitration awards see Chapter 5.

18 Arbitration Award No 2C/224/1985 from ACAS Arbitration Awards, 1985.

19 Arbitration Award No. 2C/263/1985 from ACAS Arbitration Awards, 1985.

20 One example of this view is to be found in Minford and Peel [1983].

21 For a more detailed analysis of practice over time, see Appendix II [b], pp.7/9.

22 The implications of the outcome of arbitrations will be discussed in Chapter 5. For a breakdown of the terms of reference for cases relating to pay and terms and conditions of employment see Appendix II [b], pp.22/24.

23 See Appendix II [b], pp.7/9 and 22/24.

24 From records of Arbitration Awards for the year 1948 - ref. S.A. etc. No. 21/1948, I.R. 905/1948.

25 Comment made by Lord James of Hereford [1828-1911] and quoted in Treble, 1986, p.17.

26 For discussion of this issue see Chapter 2, Section I, [iv] above.

27 See Bamber, 1987, p.16.

28 ACAS, Arbitrators' Bulletins, Nos. 2 and 9.

29 See Appendix I, p.46.

30 Because of the specific nature of the terms of reference written into the procedure agreements for the electricity supply industry, these cases were omitted from this question, reducing the sample to 142 - see Appendix III, Question 7[c].

31 See Appendix III, Question 12, for a breakdown of responses between management and trade union representatives.

32 Further discussion of the arbitration awards follows in Chapter 5 below. For figures quoted, see Appendix III, Question 20 [single and boards of arbitration cases].

33 Evidence from survey of Arbitration Awards, 1942-85 - see Appendix II [b], pp.19/20.

34 Les Parsisson stated during one of my interviews with him that when he was responsible for the arbitration service in the 1980s, the few complaints he received from parties about awards in the early days of his appointment, turned out to be as a result of asking the 'wrong' question of the arbitrator in the terms of reference. The arbitrator had answered the question set, but it was not the answer the parties wanted. He initiated the inclusion of sessions on drafting terms of reference in the training programme for conciliation officers. He considered that training the conciliation officers in this way made them more aware of the problem and helped eliminate this type of complaint.

35 Minutes of Evidence to the Royal Commission on Trade Unions and Employers' Associations, Book 1, p.75.

36 Interview with Les Parsisson.

37 ACAS Arbitrators' Bulletin, No.1, p.1.

38 Ibid, p.53. Some procedure agreements do not include a conciliation stage. In some cases parties decide that they do not wish to take advantage of the conciliation service and instead move straight to arbitration. Even where the conciliation process has not been pursued, oral evidence would indicate that a conciliation officer may offer advice in drafting the terms of reference.

39 Comments made by Professor George Bain, Seminar for Potential Arbitrators, November 1983.

40 Comment made by Professor Carbery, at Arbitrators' Seminar held in Edinburgh 1986.

41 See Question 13[b], p.37 of Appendix I.

42 Some criticism was made of arbitrators who did not convince the parties that s/he had aquainted themselves with the background papers - see comments made in Appendix III.

43 Comment made by one trade union respondent - see comments made in Appendix III.

44 This oral evidence was obtained from ACAS officials and arbitrators at the Arbitrators' Seminars in 1989 when a paper on the outcome of the Survey of Parties to Arbitration was presented by the author.

45 Oral evidence from Arbitrators' Seminars and sitting in on a board of arbitration case.

46 See Appendix III, Question 18 for the perception of the parties concerning the role of the arbitrator in the arbitration proceedings.

CHAPTER 5

THE ARBITRATION AWARD:
THE OUTCOME OF THE PROCESS

INTRODUCTION

In Chapter 3 and 4 above, the recruitment and appointment of arbitrators, the parties and issues which come to arbitration and the whole process surrounding this form of third party intervention, have been discussed. What is also of major interest to those involved either directly or indirectly in arbitration is the actual outcome of the procedure. Further it is against the results of arbitration, especially in pay disputes, that criticisms of arbitrators and arbitration itself are most often made. For example, arbitrators are accused of 'splitting the difference' between the claim and offer, or of paying little regard to the employer's ability to pay, or the economic climate in which pay settlements are made in reaching their award; and the system of arbitration is said to be inflationary [Brown, 1990; Lowry, 1986].

The objectives of this chapter are, therefore, to examine the factors which arbitrators take into account in reaching their decisions and the extent to which these have changed over time; the ongoing debate in the literature surrounding the giving of Reasons to the parties when making an award; and whether or not it is appropriate for arbitrators to offer Recommendations in their report to the parties for improving future industrial relations in their organisation. As will be apparent from the evidence discussed below, questions of the criteria which arbitrators should employ or whether they should give

Reasons for their decision or make further Recommendations to the parties, are topics which have been rehearsed at different times in the history of arbitration.

A further objective is to ascertain whether the criticisms sometimes made of arbitrators and arbitration, in relation to the results of this form of third party intervention are justified. To meet this objective, the outcome of arbitration hearings, that is the arbitration awards themselves, and the views and perceptions of those most directly involved in the process, will also be analysed by drawing on evidence from the survey of arbitration awards 1942-85 and questionnaires issued to the arbitrators and the parties to arbitration..

A major problem for researchers in investigating the results of arbitration, is that arbitration awards are deemed to be the property of the parties and as such are confidential and unpublished. Analysis of arbitration awards is, however, undertaken by the civil servants responsible for the arbitration service. Each case is recorded with respect to the type of arbitration; whether conciliation preceded the arbitration; who initiated the arbitration; the terms of reference; the subject of dispute; the result of the award; reasoning of the award; whether supplemented by recommendations; in the case of a board, the unanimity of the award; and whether after the issue of the award there were requests for clarification, complaints or any other difficulties. But the only statistics published in ACAS's Annual Report relate to the number of cases, the type of arbitration and the subject of dispute[1].

Exploring the reasons for the confidentiality of awards with the officials concerned, it was considered that parties are more inclined to use arbitration as a form of third party dispute resolution if they have control over the publicity associated with the result. For example, where an employer has provided detailed information on the company's financial affairs, the confidentiality of this information has to be protected. It is considered that most employers would not wish this type of information to be readily available to potential competitors[2], to employees or the general public. Also it was argued that it would be considered inappropriate for the British system to move towards the practice in the United States where awards are published and the name of the arbitrator revealed. It was the opinion of

officials that the American system encouraged a form of league table to be drawn up where arbitrators could be viewed as either pro-employer or pro-union in their decisions, and where the parties chose an arbitrator on the basis of their past, published record. The complexity of particular cases or the facts of the case itself would then be in danger of being lost; that is, while on the surface a particular arbitrator might appear pro-employer because his or her last awards had gone in the employers' favour, it might in fact be that the employers in these cases had the more convincing arguments.

Until the current study, apart from the access any individual arbitrator may have to his or her own records, there has been no opportunity to examine recent arbitration awards. In his discussion of pendulum arbitration, Lewis notes that:

> "There are no publicly available statistics to facilitate comparison with awards under conventional arbitration, and even if there were, meaningful comparison would be difficult."
>
> [Lewis, 1990, p.44]

Lewis's statement highlights another problem, that is of quantifying the actual awards whether it be for comparison with pendulum arbitration or other purposes. For example, in arbitrations relating to pay and conditions, the arbitrator may be asked to examine not only the level of annual pay, but a whole range of working conditions including payments for overtime, holidays and sickness or shift work and bonuses. The award then is a package which can be difficult to quantify with any accuracy. Therefore, even although additional evidence is available from this study, problems of analysis still remain. Nevertheless, some general trends in both principles and practices adopted over time can be identified.

i] Reaching the Decision

The factors which an arbitrator should or does take into account in reaching a decision have never been entirely clear, and the main focus of attention has been in respect of pay issues. One of the problems which the previous Warwick questionnaire survey of arbitrators encountered was in trying to identify such factors. Arbitrators were asked, in pay and conditions issues, to rank the extent to which a range of variables influenced their decisions. These included the merits of the case; subsequent industrial relations between the parties; the relative bargaining strength of the parties; settlements made elsewhere; the general level in the industry; the company's or industry's ability to pay; current pay guidelines; the likely effect of the award elsewhere in the company or industry; and the possible effect on the arbitrator's own reputation with the parties. They were asked to rank their response on a four point scale of Very Influential; Fairly Influential; Of Little Influence; and Of No Influence At All. Arbitrators were very reluctant or unable to quantify their actions in such a precise manner[3].

The clearest statement of ACAS's position on the factors which an arbitrator should take into account in reaching his or her award is contained in a letter from ACAS written in reply to a request for further information from one researcher in 1985:

"An arbitrator has to take into account many factors, and these include:

[i] the parties have to work together after an arbitrator's award, the purpose of which is to bring a dispute to a conclusion. There would be no point in an arbitrator making an award which perpetuated an industrial relations problem;

[ii] the effect of an award on other groups of workers;

[iii] the employer's ability to pay;

[iv] the consequences of the award, which an arbitrator has to bear as would any responsible individual.

In many cases the parties enter voluntarily into arbitration so that they can 'save face', compromise being the only solution. The arbitrator's task is to find a realistic, workable solution to their problem which takes account of the factors mentioned above and it does not necessarily follow that this will be a 'shabby' compromise."[4]

Thus the main criteria to be used by arbitrators in current practice were identified, but problems still remain over how they should be interpreted. The factors quoted are by no means clear-cut and unambiguous, especially the fourth factor cited. In addition how can an arbitrator assess with any accuracy the effect of an award on other workers; or the employer's ability to pay?

The information which an arbitrator may have at his or her disposal in order to evaluate the employer's ability to pay was a question explored by Towers and Wright [1983 a and b]. In examining general pay claim references to arbitration, Towers and Wright assessed the weight given to the disclosure of financial information by the company. Using evidence from two case studies, they argue:

"The case studies clearly demonstrated that the disclosure of financial information by employers at arbitration is something which needs careful consideration if it is not to damage, rather than assist, the employer's case. It was also demonstrated from the case studies that trade unions may be reluctant to rest their cases solely on ability-to-pay grounds and that arbitrators may consider industrial relations factors [bargaining strength, justice etc] to be more important than the financial ability of the employer to meet the union's claim."

[Towers and Wright, 1983[b], pp.83/84]

Following up the case studies with a survey of arbitrators to ascertain their experience of the disclosure of information in pay reference arbitrations, Towers and Wright conclude:

> "The practice of arbitration, in the case of general pay references, emerges from this research as a process in which awards arise from a complex consideration of a number of interlocking criteria in which that of ability-to-pay, while important, tends to be given less weight than those influencing industrial relations. In short it is more of an exercise in the intangible considerations of acceptability, peace and compromise rather than one of straightforward economics - which, in any case, is never straightforward in practice."
>
> [Towers and Wright, 1983[b], p.91]

Professor Rideout, one experienced arbitrator on ACAS's panel, notes that a number of factors will normally be considered by the wage arbitrator, namely:

> "increase in productivity, or the lack of it; increase in the cost of living; comparison with other rates and the extent of recent change in those rates; the effect on differentials, the need to avoid damaging existing pay structures and other 'knock-on' effects; the ability of the employer to pay; the ability of the employer to compete at the new rate; and the ability of the employer to recruit labour."
>
> [Rideout, 1990, p.17]

But that, depending on the circumstances of the case, differing weight may be given to the criteria and distinction made between cases in the private and public sectors. However, in drawing the distinction between the difference of purpose between the arbitrator and the judge, he stresses the primacy given to settling the dispute in arbitration:

> "The judge is trying to decide what the rights and duties of the two opposing parties are by applying a more or less complex set of rules to the facts presented to him [whether those facts are presented inquisitorially or by two straight-forward stories]. An arbitrator's purpose should be to resolve the dispute in a practicably workable fashion."
>
> [Rideout, 1990, p.13]

The views of the parties obtained in the questionnaire survey would support the suggestion that the arbitrator should see his/her primary job as settling the dispute, with 167 [84%] of respondents

agreeing with this statement and only 18 [9%] disagreeing. In disputes over pay, 103 [72%] of respondents agreed that the arbitrator should take into account the employer's ability to pay; 116 [81%] agreed that comparability should be a factor; 91 [63%] that inflation should be a consideration; but 63 [44%] disagreed with the suggestion that the general/public interest should be a criterion, with only 52 [36%] supporting this proposal [see Table 5.1][5].

TABLE 5.1

Views of Parties to ACAS Arbitration 1988

Factors which Arbitrator should consider in Disputes over Pay

[Excluding ESI cases]

Factor	Number [%] of Responses			
	Agree	Disagree	Don't Know	No Response
Ability to pay	103 [71.5]	24 [16.7]	9 [6.3]	8 [5.6]
Comparability	116 [80.6]	14 [9.7]	6 [4.2]	8 [5.6]
The Rate of Inflation	91 [63.2]	32 [22.2]	8 [5.6]	13 [9.0]
General Public Interest	52 [36.1]	63 [43.8]	15 [10.4]	14 [9.7]

Source: Brown, Questionnaire Survey of Parties to Arbitration 1988 - see Appendix III

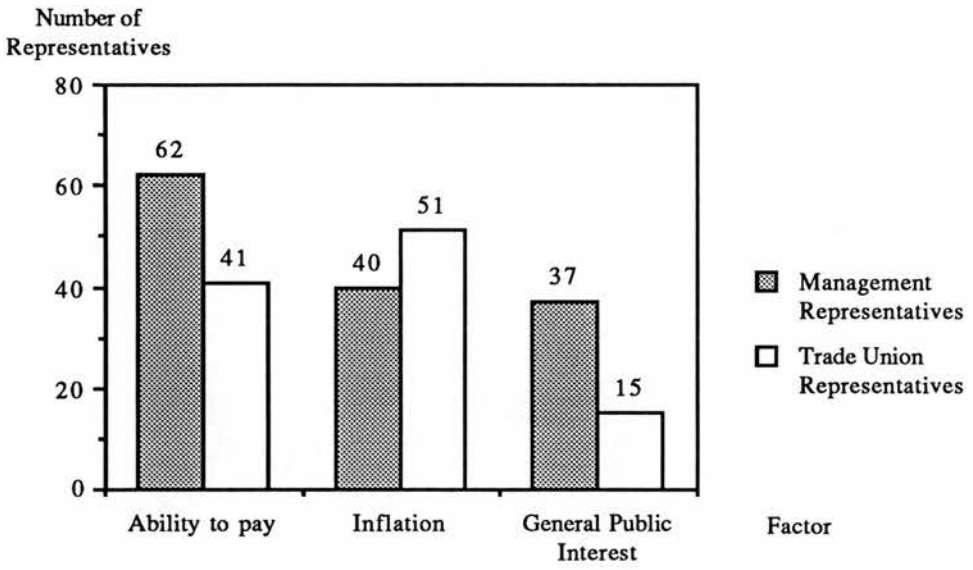
There were some interesting differences between the responses of the two sides to the dispute on three of the four criteria to be adopted by an arbitrator on disputes over pay. These are illustrated in Figure 5.a below.

FIGURE 5.a

Views of Parties to ACAS Arbitration 1988

Support for Factors which Arbitrators should consider in Disputes over Pay

[Excluding ESI cases]



Source: Brown, Questionnaire Survey of Parties to Arbitration 1988 - see Appendix III

One of the criteria mentioned above in the 1988 survey of users of arbitration was that of the interest of consumers and the general public, and the parties were divided in their views on this issue[6]. This question of the public or national interest was also a topic of debate in the Donovan Commission in the 1960s. The Commission questioned a number of witnesses on the arrangements which could or should be made to ensure that the national interest and the interests of consumers were taken into

account by arbitrators. In giving evidence, Sir Roy Wilson QC, argued that arbitrators do consider the national interest and interest of consumers, but in conjunction with the facts of a particular case:

> "It would be unrealistic to imagine that arbitrators decide each case in a watertight compartment, looking only to what they are told in that particular case. They are expected - and for the most part expected by the parties themselves - to be conversant with a wide range of economic and social considerations. ....arbitrators do in fact take the national interest into consideration, and indeed are bound to do so inasmuch as the interests of particular workers or groups of workers are in the long run bound up with the national interest."[7]

Sir Roy's evidence was supported by other witnesses. But there was opposition from witnesses to any proposal to 'ensure' that the national interest or interest of consumers should be taken into account, that is there was resistance to compulsion or statutory obligation in this area. What was deemed to be in the 'national interest' tended to be assumed by participants in the proceedings rather than clearly defined, although Sir Roy was concerned that this should not be equated with the government's policy on incomes[8].

Yet the topic was of interest to the Donovan Commission largely because of its concern with the level of incomes. One of the lines of the Commission's enquiry was whether arbitrators should be compelled to take incomes policy into account in making their decision; and whether an arbitrator's decision could be referred to the National Board for Prices and Incomes if the incomes policy guidelines were breached. Sir Roy and others resisted the proposal to make such a requirement on arbitrators:

> "The main objection to any such arrangement is that 'to ensure that arbitrators should take account of the national interest' would be widely and perhaps even universally understood as meaning 'to ensure that arbitrators should apply Government incomes policy'. It is in my opinion wrong to treat the national interest and Government incomes policy as interchangeable expressions."[9]

Sir Roy argued that to take such a move would prejudice the independence of arbitrators from government and could have a 'fatal effect' on the voluntary system of arbitration. In spite of these views, the Commission decided that:

> "The application of incomes policy will be frustrated if arbitrators make, and may even feel themselves compelled by their terms of reference to make, awards which do not conform with the incomes policy. ....It is desirable therefore that effect should be given to incomes policy in the making of the arbitration awards. To this end we recommend legislation placing on all arbitrators an obligation to take incomes policy into account when making their awards."[10]

This recommendation of Donovan's was not implemented, and indeed, one of the main reasons for setting up ACAS was to convince the parties to third party intervention that arbitrators and civil servants involved were removed and independent from government policy. The acceptability and workability of the system was dependent on this fact as was the maintenance of the confidence of the parties. Therefore, during the period when the Social Contract was in operation [1974-79], arbitrators included a caveat in their awards as follows:

> "The parties should note that I am not empowered to give any authorative ruling as to whether my award conforms with existing pay policy. Any doubts on this aspect by the parties should be clarified by seeking advice from the appropriate authorities."

But, of course, a real conflict of interest still remains between meeting competing objectives. Writing in 1983, Hunter outlines the problems posed by arbitration during periods of incomes policy. The arbitrator runs the risk either of disregarding the policy and possibly contributing to inflationary pressures; or in complying with the policy and deterring parties from referring cases to arbitration. He cites evidence to support the discouragement effect during the operation of incomes policy between the early 1960's and 1970's when the case load of the Industrial Arbitration Board fell by around 60-70 per cent, and argues:

> "There is a then a clear conflict of interest, defined in terms of the public good. For while incomes policy pursues the public interest by discouraging inflationary settlements, arbitration equally seeks to serve the public interest by reducing the costs of industrial conflict."
>
> [Hunter, 1983, p.63]

However, as Hunter and witnesses to the Donovan Commission state, without being compelled to do so, arbitrators do in practice take account of current government policy, economic conditions prevailing at any given time and the employer's ability to pay. Whether, of course, these factors constitute the 'national interest' is still a matter for debate. It could be argued that it would be surprising if the arbitrators did not take these criteria into consideration. As was noted in the selection of arbitrators [Chapter 3], they are chosen to some extent on the basis of their conformity and adherence to the accepted principles and economic orthodoxy operating within the state's arbitration machinery.

In many respects the analysis and debate, at the time of Donovan and more recently, echo that of other commentators on the operation of arbitration in the past. For example, writing in 1905 and referring to practice at the turn of the century, Knoop states:

> "Practically the arbitrator is obliged to take a great many things into consideration: the movements in demand and supply of labour and product; the keenness of competition; the alterations in the price of the product; the living wage required by the workman; and the length of training the skilled mechanic has undergone."
>
> [Knoop, 1905, p.32]

A more critical analysis is to be found in Davidson's study of the Board of Trade and Industrial Relations in the period 1896-1914. Davidson argues that although the Board of Trade never imposed a formal wages policy upon its umpires:

> "the type of arbitrator selected inevitably conditioned the criteria adopted in the determination of wage awards. ... Generally, they adhered to the traditional criteria of the state of trade, the competitive needs of a district, or changes in the selling price of the product involved. The under-lying assumption of all wage awards was that wage-rates should fluctuate with the market. Umpires refused to countenance the growing demand from labour negotiators for a 'socialistic minimum' or 'living wage'. They argued that it constituted a violation of the laws of political economy that would undermine the cost competitiveness of British industry."
>
> [Davidson, 1978, p.586/7]

Thus, as in current practice, it was and is unnecessary to introduce compulsory adherence to a formal or informal wage policy, as careful selection procedures of arbitrators can ensure that awards will be within 'acceptable' limits. Also, as discussed in Chapter 4, the arbitrator is already constrained by the terms of reference agreed before the arbitration hearing. In addition, it could be argued, that to go along the path of compulsion could threaten the use of arbitration and the raison detre behind the provision of such a service by the state, that is to avoid or reduce the incidence of costly industrial disputes.

To conclude, it would appear that the principles behind and the practice adopted in reaching an arbitration awards remains somewhat ambiguous and perhaps deliberately so. This does, of course, have implications for understanding the politics of selecting arbitrators and also for the next topic of discussion, namely the giving of Reasons for awards.

ii] Reasons for the Award

Directly linked to the debate on the criteria used by arbitrators in reaching their decisions, is the controversy surrounding the giving of Reasons as part of an arbitrator's award. The dominant view in ACAS is that formal Reasons should not be given by an arbitrator.

Clearly, as we have identified, there are also practical problems involved in giving Reasons, namely that arbitrators themselves would often find it extremely difficult to state, with any precision, the exact grounds on which they arrived at their decision and the weight to be attached to the different criteria involved. The experienced arbitrator at the induction seminar for potential arbitrators confessed that:

> "Even if you do have Reasons you would not give the real one, ie you rationalise it. You have got a conclusion and you work backwards in a sense."[11]

The policy on this issue in ACAS is that arbitrators should not give detailed Reasons for the award. Rather, if they wish to include the reasoning behind their decision, they should note the 'Considerations' which were borne in mind in arriving at the award. To the outsider the distinction between Reasons and Considerations may seem rather spurious. However, in the arbitrators' seminars and bulletins, ACAS policy is reinforced and the distinction between the two approaches drawn. For example, commenting on discussions at arbitrators' seminars, the first Bulletin for arbitrators records the following statement:

> "Reasoned Awards
>
> In the light of the perennial debate as to whether or not arbitration awards should be reasoned, arbitrators were largely able to agree that, rather than link reasons directly to awards with the consequent risk that the reasons themselves then became open to challenge, the matter was best dealt with by the introduction of a section on 'Considerations' in their reports. Many arbitrators already adopted this practice which had the advantage that 'Considerations' summarised in a neutral way the range of matters to which they had given particular attention during the arbitration, and enabled them to separate these from the terms of the award itself. It was also flexible in the sense that 'Considerations' were clearly not necessarily comprehensive reasoning. Reasons were given in practice in some form in about four out of ten awards in the past two years. In future we would prefer the 'Considerations' style to be used wherever possible."
>
> [ACAS, Arbitrators' Bulletin, No1]

ACAS's policy was underlined in a paper presented to ACAS Council by Richard Harrison [former Director of Conciliation and Arbitration]. The paper summarised the results of the questionnaire survey of arbitrators conducted by this researcher and set out some questions which he considered "raise

policy questions and therefore require comment". Paragraph 16 of the paper referred to Reasons for Awards:

> "This has been a subject discussed at some length at arbitrators' seminars. Our policy is to encourage arbitrators to set out the 'considerations taken into account in coming to the award'. This enables the parties to see what influenced the arbitrator and provides some logical justification for the award without risking the sharp reactions from one or other party that can arise if 'reasons for awards' are, rather more starkly, given."[12]

ACAS's policy on the issue was then endorsed by the Council.

But why is the giving of Reasons considered with such seriousness at ACAS? It is argued by some, that one explanation, is that to give Reasons runs the risk of setting precedents or case law on arbitration which would be counter to the traditional, voluntarist, non-legalistic approach of arbitration in Britain. The main explanation given by ACAS officials is that to give detailed Reasons also carries the danger of complaints being raised by the parties that their particular arguments had not been given sufficient weight by the arbitrator. Any such complaints could prejudice the acceptability of the arbitrator's award and could also result in another dispute over the arbitrator's Reasons. Referring to the particular problems associated with a board of arbitration, one arbitrator argued the case for not giving Reasons as follows:

> "Particularly with boards, people can often arrive at the same conclusions for different reasons - this is one of the best reasons for not giving Reasons."[13]

The arguments in support of giving Reasons are that the arbitrator is not 'God' and it helps to legitimate the award and clarifies, for the benefit of the parties, the grounds on which s/he has arrived at the final decision. Also it can aid the arbitrator in thinking through the process of decision making.

To counter the argument that Reasons can be of benefit to the parties in understanding the arbitrator's line of thinking, ACAS recommends that, if the parties would like some explanation, then arbitrators

should give Considerations. This was explored in the Induction Seminar where potential arbitrators were advised how to phrase their Considerations. Without being too specific, the arbitrator could adopt the phrase "I find particularly relevant the union's argument that ..." or "I believe the case centres on the following issue ..."

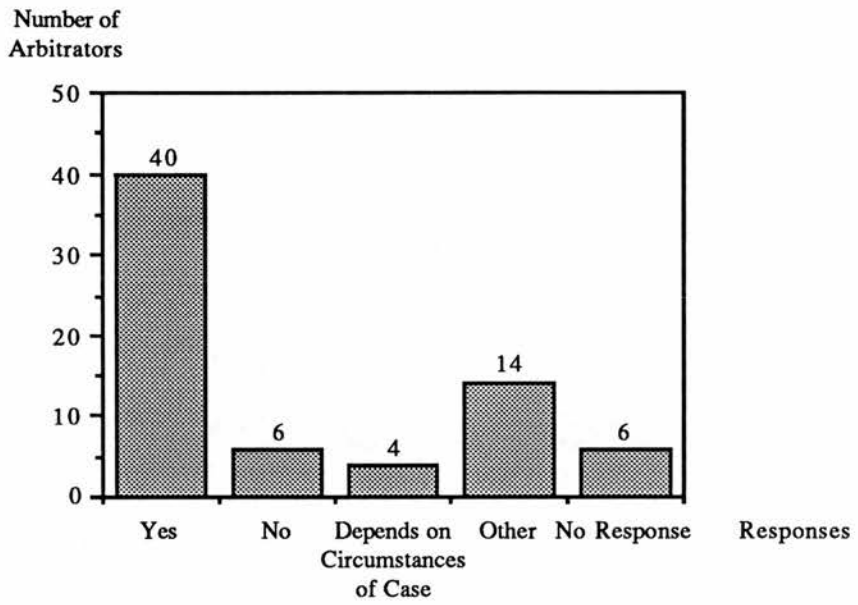
In the questionnaire survey of arbitrators [see Appendix I] conducted for this research project, the arbitrators were asked their views on the question of giving Reasons. Questioned on what they considered to be the advantages of giving Reasons for their awards, the arbitrators felt that it legitimised the award and could be of assistance to the parties in understanding how the award had been arrived at and could have an educational function in future relations between the parties. Thirteen arbitrators considered there were no clear advantages or none at all[14]. The main response to what they considered to be the disadvantages of giving Reasons for their awards was that it could lead to new disputes about the Reasons themselves. Arbitrators also thought that the parties could disagree with the Reasons given; and that there was a danger in setting precedents for the future which had 'legal' or judicial implications Only four arbitrators considered there were no disadvantages of giving Reasons[15].

The majority of arbitrators [40] preferred the system recommended by ACAS of recording their Considerations and only 6 did not prefer this system. The main reason given by the arbitrators for their support of Considerations was that they fell short of Reasons but allowed some explanation to the parties of what had influenced the arbitrator in reaching his or her decision [see Figure 5.b].

FIGURE 5.b

Survey of ACAS Arbitrators

Preference for recording Considerations to giving Reasons In Awards



Source: Brown, Questionnaire Survey of Arbitrators - see Appendix I

Given the principles outlined by ACAS and the views of the arbitrators, the extent to which practice reflected policy was explored in the questionnaire survey of the parties to arbitration. It would appear that most arbitrators are adopting ACAS's policy, as158 [80%] respondents said that the arbitrator had given some indication of how s/he had arrived at her/his award and only 28 [14%] answered no to this question.

A comparison of current practice with that of the past can be obtained from the survey of arbitration awards for the period 1942-85, which highlights some changes in practice over the period[16]. There were only two cases identified over the whole period, one in 1976 the other in 1981, where an arbitrator

gave Reasons under a heading with this title. However, in fifty per cent of cases, the arbitrators gave some form of reasoning - twenty per cent in the general discussion in the report or with the award itself, with no specific heading, and the other thirty per cent under such headings as General Considerations, Comments, Conclusions or Findings. In forty per cent of cases, over the whole period, no Reasons or reasoning were given. Breaking the evidence down into different time periods, it was very uncommon to include reasoning under another specific heading prior to 1974, although some reasoning was included in the report. It was more common in the early years for arbitrators not to give any reasoning at all. As the data illustrate the adoption of the procedure of including reasoning under a heading has increased since the arbitrators' seminars were established in the 1980s and it is now less likely that an arbitrator will make no comments at all.

What is also evident from reading the arbitrators' reports examined over the period is the greater degree of standarisation of report writing in the 1980s, particularly for boards of arbitration where ACAS Secretaries are involved in drafting the reports for the board or in single arbitrations where a Secretary assists an arbitrator in a complex case. It would appear, therefore, that there has been a growing tendency to standardize practice and that the policy recommended by ACAS is being adopted by arbitrators. The contrast with current practice, (where the average length of reports is five or six pages and which include summaries of the written and oral evidence before the arbitrator reaches his or her Considerations and award) can be drawn from one example of a case heard by an arbitrator in 1953 under the Industrial Courts Act in 1919. The total report consisted of the following:

> "On 21st February I was appointed by the Minister to determine the dispute between the X Company Ltd and the National Union of General and Municipal Workers. The dispute concerned the Union's claim for 'a substantial increase in wages for all grades of workers'.
>
> The hearing took place in the offices of the Ministry of Labour Industrial Relations Department in Glasgow on 4th March.
>
> My decision is that an increase in wages of one penny per hour should be granted to all grades of workers, the award to take effect as from the first pay-day following 1st March, 1953.
>
> 13 March, 1953 [Sgd] D. S. Anderson"[17]

However, as discussed above, although the dominant view in ACAS is that Reasons should not be given, there have long been two differing views about the desirability of giving Reasons in arbitration cases - a difference of opinion which has not been resolved. Writing in 1929, a former President of the Industrial Court, Lord Amulree argued that a study of the decisions given by the Court revealed a departure from the practice adopted by industrial arbitrators. While, with certain exceptions, it had been usual for an industrial arbitrator to give his decision without any statement of the facts or arguments, Amulree notes that:

> "The decisions given by the Industrial Court are more expansive. ... More noteworthy, however, is the endeavour of the Court to indicate the grounds of their decision. In the past it had been the rarest event for an industrial arbitrator to give any indication of the reasons which led him to decide as he had done. Reticence on this point had, indeed, been counted almost a virtue. The Court thought otherwise. They took the view that the silence maintained by arbitrators regarding the direction in which their thoughts had moved had the effect of making recourse to industrial arbitration unnecessarily hazardous."
>
> [Amulree, 1929, pp.183/4]

Therefore, the Court held the contrary view to ACAS's current practice.

Amulree was in support of the Court's approach of giving Reasons and considered that it would be advisable for the Court to build up a body of cases which would provide arbitrators in future references with certain principles on which to proceed [Lockyer, 1979; Amulree, 1929]. In discussing Amulree's recommendations, Lockyer [1979] notes that a body of case law did not materialize and that the majority of arbitration cases were carried out on an ad hoc basis without the assistance of previously published awards.

The whole issue was explored in depth by the Donovan Commission in the written and oral evidence. In his written submission and in cross-examination a different point of view from that expressed by Lord Amulree was advanced by Sir Roy Wilson QC, the last President of the Industrial Court. From his own experience and after discussing the issue with representatives from both sides of industry and

others with experience of industrial arbitration, Sir Roy was convinced that, in general, it was preferable that arbitration decisions should be given without Reasons. He advanced four reasons to support his conclusion, arguments which are familiar to current discussions:

> "(a] An arbitration award is intended to be in itself the termination of the dispute. To give reasons for the award would in general result in prolonging and possibly exacerbating the differences between the parties, or in transferring the area of controversy from one topic or topics to another;
>
> [b] It is possible that the giving of reasons would to some extent result in the building up of a body of case law. I feel that under the consensual arbitration system operative in this country case law would result in excessive rigidity of treatment;
>
> [c] It not infrequently happens that in tribunals consisting of an independent member and of what may be called 'side' members representing employers and workmen respectively all three members, while reaching the same decision, do so for different reasons; and
>
> [d] I feel sure that in general the side members of an arbitration tribunal themselves prefer not to give reasons for an award. To some extent this may be because they are frequently persons who are actively engaged in industrial relations matters and negotiations in their own industries and because it would not make their tasks in that field any easier if reasons given for their awards could constantly be quoted against them."[18]

Sir Roy added that he considered that the popularity of arbitration would decrease greatly as would the confidence which parties have in arbitration if Reasons had to be given for awards[19].

The debate has continued, however, as the following statement from one leading arbitrator, Sir John Wood, who is also Chairman of the CAC [the standing body which succeeded the Industrial Court], illustrates:

> "Of recent years, the predominant view appears to have been that the giving of reasons is inadvisable. ...Against this view there are several strong arguments. Modern practice is tending to look at all decision makers to give reasons. Only if reasons are given can a consistent pattern be seen to emerge from the various decisions in the same or related areas. Reasons enable other disputes to be voluntarily settled or parties to disputes which are submitted to prepare their cases effectively."
>
> [quoted in Lockyer, 1979, p.84]

Therefore, there is no unanimity amongst practitioners on the costs or benefits of giving Reasons. However, as has been discussed above, ACAS policy is clear on the issue and most arbitrators on the current panel adopt the recommended practice. To reject explicitly the recommendations of ACAS and give Reasons could run the risk of not being appointed to another arbitration case, especially if, because of the Reasons quoted in a report, the award was not accepted by the parties.

iii] Making Recommendations

Another area of policy closely linked to giving Reasons, is the making of Recommendations to the parties in the arbitrator's written report. The survey of arbitration awards over the period 1942-85, reveals that up to 1957 there were only two cases where arbitrators gave Recommendations. By 1973, the number had increased to eleven, and by the end of the period examined, that is 1985, there were fifty-four instances where Recommendations were given [see Appendix II [b]].

ACAS policy is very much against the giving of Recommendations, again on the grounds that they run the risk of prejudicing the acceptance of the award and of continuing the dispute between the parties on old or new grounds. At the Induction Seminar for arbitrators, John Lambert [former Director of Conciliation and Arbitration] referred to a remark made by Lord Askwith at the beginning of the century to the effect that:

> 'Arbitrators should not prophesy or state pious opinions.'[20]

The experienced arbitrator at the seminar argued that giving Recommendations could lead to future problems, and that they should not be given unless the parties requested it. He stated:

> "Do the job you are asked to do. I do not think you should volunteer recommendations - you have no idea what the ramifications will be."[21]

Similar to the discussion on Reasons above, this policy was supported by Richard Harrison in his report to ACAS Council as follows:

> "Recommendations
>
> This has also been the subject of discussion at the arbitrators' seminars. Our policy is that arbitrators should stick to the terms of reference given to them by the parties, and should only give recommendations when requested to do so by both parties to the dispute. Awards are checked by Head Office staff before they are sent to the parties to see that gratuitous advice has not crept in."[22]

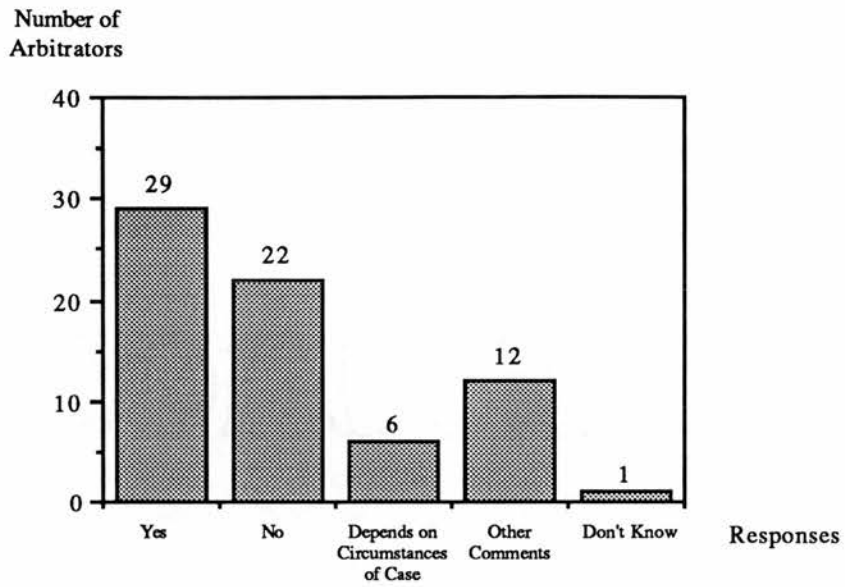
Again this approach was endorsed by the Council and no comment was made about the direct intervention of officials in checking awards.

Somewhat surprisingly, in spite of ACAS policy on this issue, when asked if they considered it was part of the arbitrator's duties to make Recommendations, 29 arbitrators in the questionnaire survey, over forty per cent, answered 'Yes' to this question and only 22 said 'No' [see Figure 5.c]. Arbitrators then elaborated on the advantages and disadvantages of giving Recommendations [see Appendix I, pp 55/7]. It would appear that there is a temptation for the arbitrator to exceed his or her remit especially if s/he considers that giving Recommendations will help the parties in their future relations.

FIGURE 5.c

Survey of ACAS Arbitrators

Attitudes to Giving Recommendations with Awards



Source: Brown, Questionnaire Survey of Arbitrators - see Appendix I, p.53

Although the survey indicates that arbitrators are tempted to go beyond the terms of reference and give Recommendations, when the parties to arbitration were asked if the arbitrator did so, an overwhelming majority [184 or 94%] stated that the arbitrator had stayed within the terms of reference laid down and only five respondents answered 'No' to this question. Also as the survey of awards highlights, arbitrators gave Recommendations in only ten per cent of cases [see Appendix II (b), pp 16/18] over the whole period. It is reasonable to assume that, at least in some of the cases, they did so with the consent of the parties. In the main, therefore, practice would seem to match the policy set out for arbitrators in this respect, in spite of the comments made by arbitrators.

iv] The Outcome of Arbitration: the Arbitrator's Decision

The outcome of the arbitration hearing is a matter of key interest to the parties involved and, as has been stated, parties are informed of the arbitrator's decision, in writing, around two or three weeks following the hearing. It is likely that regular users of arbitration keep their own records of arbitrators' decisions, but they are unlikely to have details of the outcome of other arbitration cases.

The results of arbitration, and hence arbitration itself, are also of more general interest and have been subjected to criticism on a number of grounds. The 1984 ACAS Annual Report included a statement to the effect that the Service "continues to be concerned at the misunderstanding and misrepresentation that sometimes arises over arbitration." When asked to clarify the meaning of the statement by one researcher, ACAS responded as follows:

> "The comments on arbitration to which you refer relate to the ill-informed criticisms one hears, the most common of which are:
>
> (i) arbitrators always split the difference;
>
> (ii) arbitration is expedient, unaccountable, lacking in authority, and produces each time a shabby compromise;
>
> (iii) arbitrators award money without any responsibility for funding the award;
>
> (iv) arbitrators do not have to live with their awards;
>
> (iv) neither the national interest nor the needs of groups other than the parties concerned is taken into account.
>
> Arbitration in industrial relations disputes is a far more sophisticated process than it is given credit for and the Service would reject any of the criticisms outlined above."[23]

As has been stated above, there are problems in assessing the accuracy of these criticisms as there are no published statistics on the outcome of awards, although ACAS itself dooes keep records. One

argument against the publications of such figures is that it could encourage the concept of 'winners' and 'losers' which may prejudice the use of arbitration in the future. This is also a reason advanced by those who are against the extended use of pendulum arbitration. Also, there may be a major difficulty in quantifying some awards, especially those involving pay and different terms and conditions of employment.

Some of the criticisms cited by ACAS have already been discussed in section (i) above, 'Reaching the Decision', including the question of the 'national interest'. It is not possible to test such criticisms from the data available, but one specific debate and criticism that arbitrators always 'split the difference' between the claim and offer and reach a shabby compromise was pursued. As will be discussed below, what is meant by 'splitting the difference' is by no means clear.

The analysis of the awards for the period 1942-85 was one method of examining the evidence on the outcome of arbitrations and the issue of 'splitting the difference'. However, because of the lack of background papers and the brevity of the earlier reports, it was not possible to conduct a sophisticated analysis of all cases. This was a particular obstacle for complex pay and terms and conditions of employment cases which could involve a whole package of issues. For example, the assessment of the outcome of arbitration had to be based on the last *stated* position of both parties. Because of the strategies used in bargaining, it was not possible to assess what the *real* position of both parties might have been. In addition, it was not possible to quantify, with any accuracy, the potential impact of changes in some terms and conditions of employment; or the short and long term effects of awards. The outcome of awards were divided into four different categories - 'For the Employer'; 'For the Union'; 'Compromise'; 'Varied'. 'Compromise' relates to cases where something was given to both sides - where the arbitrator 'split the difference' - although not necessarily an exact split between the claim and offer; and 'Varied' applies to disciplinary cases where the penalty was varied. Because insufficient data was available in some cases, the category 'Unquantifiable' was added; and as some cases were withdrawn during the hearing, another category 'Non-applicable' was also included.

Bearing these points in mind, for the awards studied over the period 1942-85, the outcome for all cases over the whole period can be summarised as follows. Thirty per cent of decisions went for the union and 39 per cent for the employer, that is the arbitrator made a straight choice between the offer and the claim in 69 per cent of cases. Twenty-six per cent were compromise awards between the offer and the claim. Table 5.2 details the outcomes.

TABLE 5.2

Survey of Arbitration Awards 1942-85

Outcome of Arbitrators' Awards

[All cases - a one in ten sample]

Outcome	Number of cases	% of cases
For Employer	183	39.2
For Union	138	29.6
Compromise	120	25.7
Varied	2	0.4
Unquantifiable	18	3.9
Non-applicable	6	1.3

Source: Brown, Summary of Arbitration Awards 1942-85 - see Appendix II [b], pp.19/21

If these figures are compared with what the arbitrators were actually asked to do under the terms of reference [see Chapter 4], the following results emerge. Although in 53 per cent of cases the terms of

reference were of the straight choice type, arbitrators actually made a straight choice in 69 per cent of cases. Forty-one per cent of the terms of reference allowed the arbitrator to use his/her judgement and award between the claim and offer, although this was only exercised in 26 per cent of cases. That is a compromise decision was possible in 41 per cent of cases, but arbitrators compromised in 26 per cent of cases only. Therefore, contrary to popular belief, arbitrators do not always 'split the difference'. It must be remembered, however, that the above figures include issues concerning grading and dismissal matters which do not often lend themselves to split decisions.

Because of the expansion of the Dismissal and Discipline cases handled by ACAS in the 1970s and 1980s, and because of the particular interest in these cases brought about by the proposed changes to the Industrial Tribunal system [see discussion in Chapter 4], a separate survey of the outcome of these issues was undertaken. The figures show that for Dismissal and Discipline cases over the period 1974 to 1985, 221 cases [41.5%] went in favour of the union and 249 [46.8%] in favour of the employer [see Table 5.3]. These results illustrate the point that in such cases the decision is most likely to favour one party or the other. Any compromise which does occur in disciplinary issues usually involves a reduction in the penalty inposed. [24]

TABLE 5.3

Survey of Arbitration Awards 1974-85

Outcome of Arbitrators' Awards

[Dismissal and Discipline Cases only]

Outcome	Number of cases	% of cases
For Employer	249	46.8
For Union	221	41.5
Penalty Varied[1]	54	10.2
Unquantifiable	8	1.5

[1] Where a reduced penalty was imposed by the arbitrator.

Source: Brown, Summary of Arbitration Awards 1942-85 - see Appendix II [c], p.2

As Lowry indicated, the main source of the criticism that arbitrators 'split the difference' refers to Interest cases concerned with pay and terms and conditions of employment:

> "As regards disputes of interest there is no doubt that undeserved though it is, arbitrators have a reputation, regardless of the facts of the case, of always 'splitting the difference'. To take refuge in a canard of this kind is a convenient way of avoiding a more principled argument but until ACAS and the CAC can effectively nail the lie any extension of the arbitral process into the resolution of disputes of interest will be difficult to achieve."
>
> [Lowry, 1986, p.20]

One reason why arbitrators have gained this reputation could be that some arbitrators in the past have seen 'splitting the difference' as part of the arbitrator's role. For example, Mary Rankin in discussing the Scottish cases referred to the Industrial Disputes Tribunal, in the 1950's, argued that:

> "The Tribunal's assessment will not greatly differ from that of the parties and cannot do otherwise than split the difference between them, leaning, it is true, a little to one side or the other in the special circumstances of the case."
>
> [Rankin, 1955, p.222]

Also there is another point made by arbitrators which is that in some circumstances it may be entirely appropriate to 'split the difference'. As Johnston [1978] stated: "'Splitting the difference' may often be perfectly sensible and rational." [p.89] This view is supported by another arbitrator, Sullivan:

> "There are conditions where it is appropriate to split the difference if at all possible. First, if both bargaining ratios are less than one and the costs of continuing the negotiations are very high, then a result that splits the difference may be quite acceptable. We have already suggested that this situation may well have caused the early trade unions and employers in coal and steel to adopt arbitrations and/or sliding scale wage agreements. Secondly, where the dispute is a genuine case of misunderstanding, or where the wording of an agreement may mean different thing to the two parties, this approach may be adopted."
>
> [Sullivan, 1980, p.197]

It could be argued, that if the parties to arbitration did not wish an arbitrator to 'split the difference', they could specifically ask her/him to find in favour of the claim or the offer in the terms of reference. As was stated in Chapter 4 in the discussion of the terms of reference, the parties can have a degree of control over the arbitrator's influence by placing some restrictions on the basis on which the arbitration is to be conducted. Also there is an assumption that if parties voluntarily come to arbitration then, unless otherwise stated, both are willing to concede something in the claim or the offer. As Lowry states:

> "I have never acted as an arbitrator myself but I suggest that the arbitrator acts on two assumptions. First, that the union would not be coming to arbitration unless it felt that it could secure more [than was being offered by the employer] for its members; and second that in agreeing to arbitration, the employer was anxious to avoid the alternative of industrial action and all its attendant costs. He would therefore be willing to pay a little more if such action could be avoided."
>
> [Lowry, 1986, p.16]

There is, of course, a degree of ambiguity about what the term 'split the difference' actually means. In the questionnaire survey, arbitrators were asked their interpretation of this phrase. Less than half [33] of the arbitrators understood the phrase to mean the exact half-way or middle position between the claim and offer. Twenty-three arbitrators interpreted it to mean a compromise decision somewhere between the offer and the claim [see Appendix I].

Analysing the awards for the period 1942-85 with respect to Interest cases, involving pay and terms and conditions of employment, reveals that in 17% of cases the award went in favour of the union; 24% in favour of the employer; and 55% were compromise awards [see Table 5.4]. In these cases the terms of reference allowed the arbitrators to compromise in 67% of cases, but as the awards indicate they did so in 55% of cases. Thus arbitrators made straight choices in 41% of cases although were directly asked to do so in only 31% of cases. Again the evidence would suggest that arbitrators do not always 'split the difference' although they do compromise when asked to do so by the parties. Of the compromise decisions, there were very few examples of the 50/50 split type, that is where the award was exactly half-way between the claim and offer, and the majority of awards lay closer to the employer's offer.

TABLE 5.4

Survey of Arbitration Awards 1942-85

Outcome of Arbitrators' Awards

[Pay and Terms and Conditions of Employment Cases Only - a one in ten sample]

Outcome	Number of cases	% of cases
For Employer	32	23.9
For Union	23	17.2
Compromise	74	55.2
Unquantifiable	5	3.7

Source: Brown, Summary of Arbitration Awards 1942-85 - see Appendix II [b], pp.22/4

The evidence would suggest that employers did better out of arbitration and that arbitrators were not inclined to make awards which exceeded the employers' last offer by any great extent. This would support a statement made by Lowry in discussing public sector awards that:

> "The small amounts by which arbitrators have improved upon the final offer of the employer have in my view to be judged not just against the extra cost which the awards imposed upon the Exchequer but against the enormity of the potential cost if there had been a strike as a consequence of a refusal to go to arbitration at all."
>
> [Lowry, 1986, p.15]

Lowry's statement can also be interpreted as an example of the justification for having state arbitration machinery, and a counter to those who see the market place as the best ajudicator of industrial disputes.

Given that the survey of the outcome of awards showed a bias in favour of employers, one of the questions asked of the parties to arbitration in the questionnaire survey concerned the arbitrators' decisions. The perception of the parties to arbitration in 1988 was that in respect of all cases, 80 [40%] of decisions went in favour of the employer's position; 60 [30%] found for the union's position; and 54 [27%] involved a compromise award. Surprisingly, these perceptions are remarkably close to the actual figures analysed for the period 1942-85 and confirm that, the parties to arbitration themselves recognise that employers fared somewhat better than the unions [25]. In spite of this, the service received a overwhelming degree of support from both parties to arbitration. Seventy per cent [139] of the parties considered that the award was fair and only eighteen per cent [36] were of the view that it was unfair. Excluding the cases brought to arbitration under the electricity supply industry agreement, when asked if they would use ACAS arbitration again if a similar dispute arose in the future, eighty-six per cent [124] of the parties answered 'Yes' to this question and only 12 respondents said 'No' [see Appendix III].

It is ACAS's practice not to inform the arbitrator formally of how his or her award is received by the parties. When asked in the questionnaire survey if they would like to be informed as to how their award was received by the parties, a majority [41] of arbitrators said 'Yes' and 25 answered 'No'. ACAS has always been reluctant to follow up the response of the parties, unless informally through future liaison with a Conciliation Officer. The reason for this has been a fear that to approach the parties after the case again ran the danger of raising grievances and prejudicing the acceptability of the award. Also there is the practical problem of when to approach the parties. What may in the short term appear to be a decision favouring one party, could because of changing or unforeseen circumstances turn out to be to their disadvantage in the longer term. In spite of their reluctance, ACAS agreed to the questionnaire survey of the parties and one of the questions asked related to the contribution of the award to the settlement of the issues in dispute. Excluding the electricity supply industry cases, over ninety per cent of respondents considered that in the time since the award was issued it had made an excellent, very good, good or moderate contribution to the settlement of the

dispute. Asked the same question in relation to the longer term, the percentage was reduced, but still exceeded eighty per cent [see Appendix III].

Finally, as an additional way of gauging the level of satisfaction of the parties, respondents were invited to make additional comments regarding their personal experience of ACAS arbitration. Of those respondents making additional comments, a significant number noted the efficient and professional service offered by ACAS and the impartiality shown by arbitrators. One employer stated that he was "Very impressed with the slick ACAS organisation" and one trade unionist concluded:

> "In my experience ACAS have provided an essential service to industrial relations practitioners who find themselves unable to resolve difficulties via the normal procedure. Whilst I agree that arbitration/conciliation should only be necessary in exceptional circumstances, the mere fact that the safety valve exists is helpful. The standard of service provided by ACAS and its arbitrators is high and perfectly satisfactory. In general I am more than satisfied with the impartiality shown."[26]

It would appear from the above evidence that first, criticisms that arbitrators always 'split the difference' and make shabby compromises are unfounded; and second, that despite criticisms made of arbitration, the service does enjoy strong support from the parties involved.

Summary

It is evident from the above discussions that many of the current debates surrounding the criteria used by arbitrators in reaching their decisions; the giving of reasons and recommendations; and the criticisms sometimes made of arbitration, echo previous discussion and analysis of the process of arbitration and its results.

Although these issues have been debated over the last century, the principles on which arbitrators reach their decisions remain largely unspecified, although they are 'learned' by the arbitrator through experience and contact with ACAS officials and other arbitrators. Differences of opinion still exist regarding the practice of giving reasons or recommendations, but in the main, the policy recommended by ACAS officials and endorsed by ACAS Council is adopted by arbitrators.

It has also been illustrated that many of the criticisms made of arbitration are largely unfounded and that the evidence would suggest that arbitrators do not simply 'split the difference'; and in making their awards they do give consideration to a wide range of factors including the general economic climate and the employer's ability to pay. It can be argued that the dominant doctrine of political economy at any given time and the terms of reference put to arbitrators have constrained the outcome of arbitration awards. Although arbitrators in the post-war period did not follow the practice of their predecessors at the end of the last century of awarding wage reductions [Davidson, 1978] - there was only one case in the survey where an arbitrator issued an award below the level of the employer's final offer - nonetheless they have operated within a market framework. Because of the limited data available and problems of conducting such analysis, it was not possible to test the criticism that arbitration awards were inflationary. However, although as illustrated, arbitrators wrote in a caveat in their awards to the effect that they were not constrained by incomes policies in operation, it was and is unusual for arbitrators to award a pay claim which is markedly out of line with the going rate of inflation or the rate for the job in a particular industry.

In spite of the fact that parties often 'lose' as well as 'win' arbitration cases, there is a remarkable degree of support for the service. To ACAS's knowledge there are no occasions on which an award has not been implemented by the parties since 1974. Again similar evidence can be obtained from the history of arbitration. For example, Knoop [1905, p.20] and Amulree [1929, p.112] remark on the fact that, in the main, arbitration awards were accepted and implemented by the parties to arbitration at the beginning of the century. The fact that parties abide by the moral obligation on them to accept the

award is the strongest argument ACAS and other supporters of the voluntaristic system of arbitration have in resisting any moves to make arbitration compulsory or awards legally binding.

Finally, the alternative to arbitration may be a costly dispute which neither side may relish. Quoting the words of a well-known arbitrator at the beginning of the century, Knoop states:

> "Unorganised labour, the new union, the employer, who though old in years, first meets a labour trouble and who has not learnt that 'war is hell' - such do not need arbitration. They believe they can win out and are quite sure to have nothing to arbitrate. In proportion as the contestants learn to respect the ability of the opponent to inflict injury and appreciate that victories are expensive, they will be willing to arbitrate, provided, of course, they have confidence in the tribunal proposed."
>
> [Knoop, 1905, p.17]

Although political and economic pressures in the 1980s were in favour of less consensus and a move to free market solutions to industrial relations problems, it is clear from the surveys of arbitrators and the parties to arbitration that there is still a considerable degree of support from those who choose this method of dispute resolution[27].

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1 As has been indicated in Chapter 4, the background papers relating to arbitration cases are destroyed after a two year period. The report and award are kept in bound volumes in ACAS Head Office.

2 As evidence from the past would indicate, employers were reluctant to appoint an arbitrator, who was also a local employer, because they did not want him or her to have access to detailed financial information.

3 Oral evidence from interviews with arbitrators confirmed this view. Arbitrators often found it very difficult to articulate exactly which factors influenced them most.

4 Extract from letter from Les Parsisson, ACAS to P.J. White, Business Studies Department, University of Edinburgh, dated 6 June 1985.

5 For more detailed figures see Appendix III, Question 25.

6 Ibid.

7 Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence, 1966, pp. 1936/7.

8 It is interesting to note Sir Roy's concerns in this regard, especially as Prime Ministers [for example Harold Wilson] often appealed to the 'national interest' as a reason why the government's incomes policy should be accepted and implemented.

9 Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence, 1966, p.1936.

10 Paragraph 285 of Donovan Report, quoted in Incomes Data Study of Conciliation and Arbitration, August 1972.

11 Comment made by Professor George Bain at Seminar for Potential Arbitrators, November 1983.

12 Discussed at Council meeting attended by this author in 1985. Harrison's policy paper was based on the results of the questionnaire survey conducted by this researcher.

13 Comment made by Professor George Bain at Seminar for Potential Arbitrators, November 1983.

14 For a full breakdown of the responses from arbitrators, see Appendix I, Question 16 [a], p.47. Note, the arbitrators were free to suggest any advantages which occured to them. Closed response options were not given.

15 For a full breakdown of the responses from arbitrators, see Appendix I, Question 16 [b], p.48. Note, the arbitrators were free to suggest any disadvantages which occured to them. Closed response options were not given.

16 See breakdown of details in Appendix II [b], pp.27/29.

17 See Arbitration Awards 1953. The above example also provides an illustration of the kind of vague terms of reference which ACAS tries to avoid - see discussion of terms of reference in Chapter 4.

18 Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence, 1966, pp. 1935/6.

19 Ibid, p.1957.

20 John Lambert made this remark when he attended the Seminar for Potential Arbitrators in November 1983.

21 Comment made by Professor George Bain at Seminar for Potential Arbitrators, November 1983.

22 This author attended the Council meeting at which this was discussed in 1985. Harrison's policy paper was based on the results of the questionnaire survey conducted by this researcher.

23 See footnote no.4 above.

24 In dismissal cases, if the employee was not dismissed this was quantified in terms of 'for Union'. However, some employees received some form of penalty, for example loss of wages or downgrading.

25 See Appendix III, question 20. If the cases are divided between single and boards of arbitration and the ESI cases, significant differences in perceptions of the outcome are revealed. In ESI cases in particular, it would appear that there is a strong bias in favour of the employers' side. However, the compromise decision noted here refers to cases where the employee was not dismissed but was subject to another form of discipline. This was treated in the analysis of arbitration awards for the period 1942-85 as 'for Union'. Therefore, if it is analysed as such in this survey, then the disparity between the outcome for employers and trade unions is reduced. It can be argued that this is how such a case would be interpreted by the trade unions involved, ie the object for them is to ensure that the employee is not dismissed and they may even concede and that another penalty should be imposed.

26 See full details of comments made in Appendix III.

27 As Lowry (1990) argues, however, this method of third party dispute resolution has always had limited use in the British system of industrial relations. The explanations advanced by him are [i] trade union preference for strike action; [ii] employers' reluctance to hand over responsibility to a third party; [iii] disenchantment with war-time experience of compulsory arbitration; and [iv] employers' suspicion that arbitrators will always 'split the difference'.

PART III

IMPLICATIONS

CHAPTER 6

CORPORATISM AND ARBITRATION

INTRODUCTION

Using data and material gathered from questionnaire surveys, studies of arbitration awards and oral evidence from interviews and seminars, chapters 3 and 4 provide information on the principles and practices involved in selecting arbitrators and the arbitration process itself; and chapter 5 provides data on the outcome of arbitration hearings.

The objective of this chapter is to bring together the evidence available on the practice of arbitration under ACAS with the more theoretical discussions and debates outlined in chapters 1 and 2.

This chapter is, therefore, addressed to two questions. The first asks how can we assess ACAS arbitration in the light of the corporatist debate. The second considers whether the so-called rejection of corporatism and attack on trade union power by the Thatcher governments have had any significant effect on the work of the ACAS arbitration service.

i] ACAS Arbitration: Corporatism in a Cold Climate?

> "Although pluralism, corporatism, centralisation, partnership and other concepts provided lenses through which to view reality, the authors found that these lenses were difficult to focus, their angle of vision was unknown, and it was not clear what filters to use."
>
> [Raab, 1990, p.19]

As the quotation from Raab illustrates there are difficulties associated with using any particular concept as a description or view of 'reality'. As such there are numerous problems in applying discussions on corporatism to ACAS arbitration. Crouch's [1985] model of Contestation, Pluralist Bargaining, Bargained Corporatism and Authoritarian Corporatism is useful, but it was developed to explain relationships at a macro level of analysis. In addition most of the debates on corporatism at different levels of analysis are concerned mainly with policy making. In the strict sense of the term, ACAS does not make policy in relation to the labour market and certainly not in relation to macroeconomic management, although senior ACAS officials do have an opportunity to comment at least informally on aspects of labour market reform, especially industrial relations reform[1]; and ACAS as an organisation, through ACAS Council, can participate in government consultative exercises, for example the proposed reform of Wages Councils[2]. In view of the anti-union rhetoric of the government, ACAS, as a tripartite organisation dependent on the support of both sides of industry, has attempted to distance itself from some of the more controversial aspects of the government's industrial relations reform.

ACAS is active, however, in making and reinforcing policy in relation to the conduct of arbitration and in a more general sense in relation to dispute resolution. In these respects, as was illustrated in chapters 3-5, it has remained essentially conservative in its approach with emphasis on maintaining the status quo. In contrast, at the macro level the government has attempted to break with the post-war consensus and compromise approach to dispute resolution and to establish a more adversarial and contestation strategy. Crouch summarises developments as follows:

> "In some respects it is possible to describe the changes since 1979 as a determined return from an unsuccessful bargained corporatism to a classical pluralism, with organised labour being pressed back into its 'proper' limited confines. However, there are some indications that the government, and a few sections of capital, want to go even further. Pluralism implies strengthening [a] the middle levels of the labour movement against the shop-floor, and [b] the elaboration of procedures for dispute settlement. But it is present policy to weaken union leaderships and to break up many established procedures of dispute settlement .... this is a shift to contestation."
>
> [Crouch, 1985, pp.84-5]

Such a shift to contestation has not occurred in ACAS in general and its arbitration in particular, where the whole ethos continues to be one of consensus and co-operation. If such a shift was to filter down to all levels of industrial relations then, it could be argued that, the raison detre of ACAS and the organisation itself would cease to exist. It would appear that, even if Crouch is correct in stating that the government and a few sections of capital wish to return to contestation, a substantial number of employers do not welcome such a move[3].

If we apply Crouch's framework to ACAS as an example of a meso level organisation we can reach the following conclusions. As has been suggested the model of contestation where the relationship between the parties represents a zero-sum game, that is where a change to the benefit of one party can be achieved only through a concomitant change to the disadvantage of the other and where neither party can be expected voluntarily to concede gains to the others, cannot be used as a description for the relationship between the parties to arbitration. As we have discussed parties come to arbitration voluntarily, most references are made jointly by both parties, the parties can limit the cost of the outcome of arbitration through the terms of reference, and both parties agree to be morally bound by the arbitrator's decision. The whole point of them coming to arbitration is that they are no longer willing to bear the costs of contestation. Also, the practitioners most directly involved with arbitration argue that, in general, parties would not go to arbitration voluntarily unless they were prepared to concede something to the other side.

We can also reject the model of authoritarian corporatism as a description of the arbitration process. Given that this form of corporatism can only exist in Crouch's analysis when the state has crushed autonomous representative organisations, then clearly such circumstances do not apply.

The model of pluralist bargaining where both parties decide that they would stand to gain from a reduction in the costs of conflict, a positive-sum game, would appear to be more appropriate to the arbitration relationship[4]. Under this model parties develop rules and procedures for resolving matters of dispute including the use of conciliation and arbitration. To adopt this line of action does impose restraints on the parties' freedom of action, but it is assumed that such restraint will be tolerated in order to reduce the potential costs of conflict. Under such arrangements the role of representatives is to convince their respective constituencies that there is more to be gained by adopting dispute procedures to resolve a disagreement between the parties than to pursue strike action. Also current negotiations are influenced by the assumption that the relationship between the parties will be long-term and the likelihood that there will be future bargaining rounds between them. From the survey of the parties to arbitration it was evident that the parties considered there was more to be gained from coming to arbitration than continuing with their dispute; the majority of respondents stated that they would use arbitration again in similar circumstances; and there was evidence to suggest that the parties considered the likelihood of future bargaining rounds[5].

The criteria for bargained corporatism identified by Crouch [1986] would also appear to be present in the arbitration process. That is the assumption that there will be pursuit of joint interests by the parties; and in order to realise common interests the parties will be constrained to reduce potential conflict and to exclude a zero-sum game. However, parties will not always follow a positive-sum approach as they may have to sacrifice one particular round of negotiations for the sake of potential future gains. In this way the outcomes of bargains will be traded over time and the participants will build up credits, although whether the eventual outcome will favour either capital or labour is not pre-determined. Finally, the practitioners will also become experts and derive status from their role in the

process. Clearly there are elements of the arbitration process which fit this description. Most references to arbitration are made jointly and joint references are encouraged by ACAS[6]; parties who use the service over the long-term do build up credits and are prepared to accept losing a specific case on the grounds that future references will go in their favour[7]; and participants in the system do derive an expertise and status from their involvement[8].

Therefore, there would appear to be elements of pluralist bargaining and bargained corporatism - a pluralist corporatism - in the operation of ACAS arbitration which has not altered since the election of the Conservative government. This could provide evidence of the co-existence of pluralism and corporatism identified by Cawson [1988]. Further, contrary to changes in the policy approach at the macroeconomic level and in the industrial relations climate, support for arbitration has been maintained[9] and ACAS still maintains control over the organisation of the arbitration service. ACAS's practice of appointing arbitrators has not altered significantly; it continues to set the agenda for policy discussions on arbitration; and apart from the move to improve professionalism and efficiency the operation of the arbitration system has remained unchanged. It would appear from the evidence in this thesis that the 'rules of the game' are accepted and supported by a whole network of relationships which have been built up between the representatives of trade unions and employers and the civil servants involved in ACAS on the one hand, and the civil servants and the arbitrators on the other. Such developments could also provide an illustration of the dualism referred to by Goldthorpe [1984], where the government has played a strategic role in attempting to break corporatist arrangements and encouraging dualism at the macroeconomic level, but where corporatist relationships are maintained at other levels of analysis.

Taking a different approach and adopting Grant and Sargent's [1987] key features of corporatism, namely intervention, intermediation and incorporation, one can reach the following conclusions. At the level of dispute resolution the state does intervene, albeit through a quasi-departmental organisation, in a complex way and on the voluntarist principles established in British industrial relations. The pressure to write-in some form of third party [and state] intervention in procedure agreements to apply

to certain stages of a dispute has built up over the last thirty years. Even where ACAS arbitration has not been written into an agreement, should a dispute reach the stage of actual or threatened industrial action, it is ACAS policy to 'run alongside the dispute' offering assistance to the parties. Every attempt is made to resolve the dispute, preferably without resort to arbitration itself, which is considered to be the final stage in the process[10].

There is also evidence of intermediary relationships between ACAS and the representatives of organised interests. ACAS endeavours to encourage 'good practice' in industrial relations by issuing publications and carrying out advisory visits to workplaces. If parties proceed to conciliation, a whole network of relationships is built up between ACAS conciliators and representatives of employers and trade unions. Once parties have agreed to refer a case to arbitration they are morally bound to participate in proceedings as established by ACAS and to accept the outcome of the arbitrator's decision. Through the whole process both sides are represented and to some extent regulated by interest group leaders. It is usual for the procedures and the outcome of an arbitration, no matter how unwelcome by either party, to be honoured by both sides[11]. Therefore, in arbitration cases, representatives of trade unions and employers have been successful in delivering the acceptance of their respective constituencies and the implementations of the decisions reached.

Lastly the element of incorporation referred to is also present in the arbitration process. Representatives of employers and unions are naturally drawn closer to state dispute resolution machinery when they agree to come to ACAS to resolve a dispute. Especially in relation to arbitration they sacrifice autonomy of action by giving up the final decision to a third party. As illustrated by the relatively small number of cases which proceed to arbitration, this is a price which some employers and trade unions are not prepared to pay.

A third approach would be to use Moore and Booth's [1989] analysis. ACAS arbitration would appear to fit neatly into their description of 'negotiated order' where a state institution has been established; in which the state's interests are articulated by a representative or a surrogate who acts as an agent of the

state and where organized groups are also represented; and where the parties involved in such arrangements are responsible and accountable for the attainment of agreed objectives. However, the operation of ACAS arbitration also contains the criteria which Moore and Booth identified as being necessary to represent corporatist arrangements, that is representation, responsibility and control. These latter criteria are close to the key factors identified by Grant and Sargent [1987].

Therefore, the answer to the question as to whether corporatism is an accurate description or view of reality for the arbitration service is both yes and no, because it all hinges on the actual definition of corporatism employed. Application of the different models above do reveal some support for corporatist relationships within ACAS and its arbitration service. But it must be stressed that arbitration is a very limited activity in British industrial relations. Therefore, while corporatist arrangements may be evident in the process, one must question the level of significance of these arrangements for industrial relations in general. Nevertheless, given the anti-corporatist statement and the rhetoric and policies of the Conservative governments post-1979 on industrial relations, some impact on ACAS's arbitration service could have been anticipated. It is necessary, therefore, to examine the effects, if any, on the operation of ACAS and the practice of arbitration.

ii] The New Regime: Rejection of Corporatism and Trade Union Power

> "With the election of Margaret Thatcher's Conservative administration and its continued dominance throughout the 1980s, the era of corporatism might be considered to have been quietly laid to rest. This view of policy-making in Thatcherite Britain is one which we challenge."
>
> [Moore and Booth, 1989, p.3]

As discussed in Chapter 2 above the Conservative administration which took office in 1979 rejected both the post-war consensus and the corporatist arrangements which the consensus was said to have fostered. Instead they offered the electorate an alternative to the policies pursued by previous post-war

governments - a new beginning [Conservative Party, 1979]. This 'new' approach to economic management and the adoption of monetarist rhetoric was associated with the influence of 'New Right' philosophy within the Conservative Party [Bosanquet, 1983; King, 1987]. As the trade union movement was identified as one group in society which was deemed to have become too powerful under corporatist arrangements, the government proposed to exclude trade union representatives from policy discussions and to introduce legislation designed to shift the balance of power in industrial relations back towards employers [Conservative Party, 1979].

The impact of the government's approach to industrial relations on the British trade union movement has been widely debated[12]. It is not possible in this thesis to explore this debate and the other factors which have contributed to any changes which have occurred since 1979 in any detail. Rather this section examines whether the government's stated policy on trade union reform has impacted to any significant extent on the arbitration service of ACAS.

It is generally accepted that after the Labour government's attempt to include representatives of the trade union movement in negotiations regarding wage and benefit levels and to regulate wage increases under the Social Contract [1975-79], the Conservative administrations post-1979 have indeed excluded trade unions from such a role [Grant, 1989; MacInnes, 1987; McIlroy, 1988]. One reason for this exclusion was that formal incomes policy of the type pursued in the 1960s and 1970s was abandoned as a policy instrument. The Conservative government explicitly rejected incomes policy as a means of controlling inflation, arguing first that inflation could only be reduced by control of the money supply and second that wage levels should be determined by negotiation between employers and unions which in turn would be affected by market conditions in any particular industry. The new government did, however, recommend limits for pay settlements in the public sector in line with its objective to reduce public spending and used 'cash limits' as one method of imposing a constraint on public sector pay levels. Also Brown and Sisson [1983] have identified three additional forms of incomes policy being pursued in the public sector in the early 1980s, namely indexation of pay for the armed forces, police and fire services to national average earnings; Pay Review Bodies for groups including doctors,

dentists, judges and politicians; and cutbacks in funding to those industries in the private sector dependent on subsidies from the Exchequer.

In excluding the trade unions from government level discussions, Grant argues that the Conservative government broke away from the tripartite style of policy-making which was adopted not only by the last Labour administration but in the last two years of the Heath government from 1972-74. Although Grant describes the 1970s as a period of tripartite policy making process, he contends that:

> "tripartite arrangements fell far short of the corporatist ideal in so far as the CBI and the TUC often had great difficulty in implementing agreements."
>
> [Grant, 1989, p.34]

The reason cited by Grant was that, because of inherent weaknesses in the CBI and TUC, neither organisation could ensure acceptance and implementation by their members of any agreements reached with government. In addition he cites Joel Barnett's, Chief Secretary to the Treasury in the 1974-79 Labour Cabinet, statement that Labour paid a high price to obtain the co-operation of the trade unions, as temporary agreements on incomes policy were obtained at the expense of commitment by the government to legislative concessions to the movement. Grant argues that the legislative changes, which were deemed to be pro-union, outlived the gains to the government from the labour movement's short-term acceptance of the restraint on wages under the Social Contract. While accepting that neither the CBI or the TUC are organisations which can guarantee their members' compliance with any agreements reached, I would take issue with Grant on the second point relating to the cost imposed on the Labour government. By their very nature attempts at corporatist arrangements are not costless and will inevitably entail some form of bargain or concessions from government in return for wage restraint. However, if governments are prepared to pursue such a bargain, it is assumed that they are doing so because they judge the costs of not entering into such a relationship will outweigh the concession costs. Whether or not they calculate the relative costs accurately if, of course, another matter. Arguably, what happened in the case of the Labour administration was that it was unable to deliver its side of the bargain when world economic conditions worsened. Finally, as we have

witnessed in the 1980s, any advances gained by the trade union movement in legislative terms during the 1980s have been eroded by the industrial relations and other labour market reforms of the current administration. The other element of the implicit contract between Labour and the unions in the 1970s, namely improved social benefits for working people, have also been reversed in the 1980s.

One reason for the rejection of tripartite policy-making by the new government discussed by Grant [1989] is that they identified corporatism in Britain in the post-war period as one of the causes of Britain's poor economic record in the past. He quotes a 1988 White Paper which claimed:

> "The ability of the economy to change and adapt was hampered by the combination of corporatism and powerful unions. Corporatism limited competition and the birth of new firms whilst, at the same time, encouraging protectionism and restrictions designed to help existing firms."
>
> [Cm. 278, p.l quoted in Grant, 1989, p.35]

The government's analysis sits at odds with the orthodox, but not universal, view of corporatist theorists that corporatism has never existed or has failed to be established in Britain. Grant explains the apparent disparity between the different analysis in terms of the loose application of the term corporatism and its confusion in the literature with tripartism and the failure to define the concept more precisely. But, it can be argued that, even if the term was used loosely, and in an academic or theoretical sense corporatism did not exist, nevertheless it did have a powerful political currency.

What the Conservative administration would appear to be referring to is a particular style of government and policy-making which they argued had developed in the post-war period of so-called consensus politics. It was associated with, or indeed can be seen as a consequence of, adherence to the economic orthodoxy of Keynesian demand management and the primacy given to the objective of full employment. Whether in a technical sense previous post-war government's were Keynesian, as Tomlinson [1985] argues, the fact that they worked on certain principles which assumed that they were, influenced the behaviour of key economic actors.

To some extent Tomlinson's argument can be advanced with respect to the popular use of the term corporatism to describe the late 1960s and especially the 1970s. It reflected a growing perception that, as governments responded to the combined problems of rising inflation and unemployment and as traditional Keynesian demand management techniques did not appear to provide the 'answer', they resorted to formal incomes policies, mainly as a crisis measure, in an attempt resolve their dilemma. The use of incomes policy necessitated the bringing in of both employers and unions into a more direct relationship with the state, a move which was interpreted by writers from both a left and right wing perspective as anti-democratic. Rightly or wrongly this trend was labelled corporatist as it represented a move beyond tripartite arrangements whereby representatives of employers and unions sat on government bodies. Instead a more direct role was accorded to employers and unions, first, in agreeing national wage levels and in the case of the social contract, benefit and legislative concessions; second, in 'selling' such agreements to their respective memberships; and last, in effect in implementing policy. In the event, the inability of the CBI and TUC to ensure the compliance of their members over a sustained period meant that corporatism as a method of dispute and crisis resolution was short-lived. As has been indicated, it was also an expensive option for the state in terms of other benefits or legislative concessions. Nevertheless this did not prevent leading trade unionists like Jack Jones being considered as, if not more, powerful than the Prime Minister of the time [MacInnes, 1987, p.45; Coates and Topham, 1986, p.56] and increased public concern about the role which union and employers' representatives were perceived to be playing in the policy making process. These perceptions, together with growing unrest about public sector pay disputes, contributed to public opinion and the view that unions and some trade union leaders were becoming too powerful in British society.

Therefore, as discussed in Chapter 1 and highlighted in the quote from the government's White Paper above, not only corporatist arrangements, but the trade unions were identified by the new Conservative government under Mrs Thatcher as a cause of Britain's economic decline. As a result the new administration was determined to change the balance of power in industrial relations in favour of employers. One of the methods of achieving this objective was stated in the Conservative Party's

1979 Manifesto to be trade union reform. Attempts at trade union reform were, of course, not new in British industrial relations and had been pursued unsuccessfully in 1969 and 1971 by previous Labour and Conservative administrations. However, by the time the new administration took office in 1979, economic conditions in Britain and the world had changed considerably from those existing in the 1960s and 1970s. Expensive concessions to the trade union movement in return for wage restraint was one option which the new government was no longer prepared to entertain.

Instead the Conservative government excluded the trade unions from discussions at governmental level; with some notable exceptions, reduced the power of tripartite bodies such as the NEDC; moved to privatise large sections of the public sector thus reducing the problem of public sector pay; deregulated the labour market by reducing the power of Wages Councils and employment and other rights; and embarked on an ambitious programme of trade union legislation. For a government which was on record as supporting a free market philosophy, they were surprisingly active in the labour market. But it was activity or intervention designed to remove perceived obstacles to the free functioning of the labour market [Brown, 1988a and b; Brown and King 1988].

Some authors have argued that the Thatcher government's approach to trade union reform can be interpreted as an extension of policies adopted by previous Labour and Conservative administrations, and as such are not significantly different or radical in relation to post-war trends. While recognising that the impact of government policy should not be over-estimated, it is argued here that if one considers the context within which these reforms took place, that is under the new economic orthodoxy of monetarism; that the reforms were implemented without consultation and above the heads of trade union leaders; and the fact that they were combined with a whole package of labour market reforms discussed above, then such an approach marks a significant departure from post-war policy in this area.

Locating events in Britain within a context of the response of capitalist democracies to labour market problems in the post-war period, Robertson [1986] argues that in the 1970s capitalist democracies

normally used three main methods of resolution. The first he describes as a passive, social democratic or guardian strategy as operated in Britain; the second as an active, social democratic or egalitarian strategy such as that adopted in Sweden; and the third as a passive, neo-liberal or business-centered strategy as pursued in the United States. He contends that the Thatcher administrations resurrected a fourth strategy which he describes as market-centered which combines neo-liberalism with an active state. Thus although the government may have shifted from an active to passive demand management strategy at the macroeconomic level, this has involved a shift from passive to active labour market management. Robertson cites the strategic role given to the tripartite body the MSC, downward pressure on wage levels, changes to the benefit system, increased incentives to work; and employment and training programmes as evidence of the government's activitism. Robertson's list is by no means exhaustive and other policies pursued by the government can be included to support his argument [Brown, 1988a and b; Brown and King, 1988].

In spite of the anti-tripartite, anti-corporatist and anti-quango rhetoric of the government, it is perhaps surprising that a tripartite quango such as the MSC should be given such an major role in labour market strategy. The expansion of the MSC is cited by some authors as evidence that corporatism was still alive and well in Britain in the early 1980's and has been practised by the government in specific circumstances. However, the rise of the MSC was associated directly with the rise in unemployment, especially youth unemployment, in the early 1980s [Benn and Fairley, 1986; Brown and Fairley, 1989]. At this stage the government needed the co-operation of the TUC and trade union representatives on the MSC to secure trade union acceptance and implementation of training policy. With demographic changes and an upturn in economic activity in the late 1980s, unemployment ceased to pose such a political problem for the government. Moves were then made to reform the functions and balance of representation within the MSC. Increasingly trade unions were not consulted before major training programmes were adopted and implemented. In the latter years of its existence the representation and power of trade unions and local authorities on MSC committees declined significantly. The government changed the functions and name of the quango to Training Commission then Training Agency before abolishing it as a separate organisation and returning many

of its responsibilities back to the Department of Employment [Brown and Fairley, 1989]. Therefore, if the MSC was an example of corporatism under Thatcherism it was a very short-lived one. The experience also provides a good illustration of how an administration can use a particular form of government, in this case a non-departmental body, with a particular objective in mind and then dispense with it when the policy which it was designed to address is no longer considered a problem for government. This is best illustrated with a quote from Hood and Wright:

> "The non-departmental body thus appears to be a remarkably tenacious form of government, even in ostensibly 'hard times' . . . It offers at least four potential political uses that are not likely to disappear.
>
> First, governments will probably always have need of 'unacknowledgeable means' or at least of bodies from which central government can distance itself in some sensitive areas, such as arms sales and cloak-and-dagger activities at home as well as abroad. Second, given that modern governments need to have a permanent administrative apparatus of some sort, there will presumably always be a value in having contemporary, expendable organisations outside the permanent government service that can be discarded when circumstances permit. Third, the use of such bodies as an administrative means of by-passing other public organisations that for one reason or another politicians distrust goes back at least as far as the seventeenth century. Fourth, the advisory committee is frequently too convenient a device for political 'window dressing' to become extinct as a form of non-departmental body."
>
> [Hood and Wright, 1981]

The experience of ACAS is somewhat different. It was not identified as an institution to implement a major change in government policy and as such has neither experienced the spectacular rise or the fall of the MSC post-1979. Like other non-departmental bodies ACAS has suffered reductions in the real value of its Budget; pressures to reduce its activity in some areas of its work such as the advisory service or 'fire-prevention' work; and there has been some speculation about the organisation charging for some of the services it provides[13]. In most respects, however, ACAS has survived the change of government largely intact, and its main functions of advisory, conciliation, mediation and arbitration work have continued.

Specifically in relation to arbitration, Lowry [1990a] notes that as part of the deregulation policies of the Conservative government, Schedule II was repealed by the Employment Act 1980; the Fair Wages Resolution was rescinded with effect from September 1983; and statutory trade union recognition was repealed in Section 19 of the Employment Act 1980. Thus three grounds for unilateral access to arbitration disappeared from the statute book. However, the decision by the government to legislate in these areas came as no surprise. As has been discussed above, these issues, especially the provision for trade union recognition, had been contentious matters in the past.

Lowry refers to an argument advanced by Bassett that the Cabinet's secret economic committee reviewed arbitration and, according to a Cabinet paper, concluded:

> "The only sure way for employers to avoid the risk of awards which they cannot afford is to refuse to go to arbitration. It follows that arbitration should not take place without their consent, but only on mutual agreement."
>
> [quoted in Lowry, 1990a, p.59]

Therefore, Lowry concludes that the Thatcher government was not totally opposed to the principle of arbitration. Rather, they were against unilateral access to, or compulsory arbitration. Their support for the proposition that arbitration should only take place on a jointly agreed basis, is according to Lowry, reflected in more recent agreements signed with the Civil Service unions. That is, where the government had withdrawn access to arbitration for some workers in the public sector, it has been prepared to re-negotiate agreements which allow for arbitration on a mutually agreed basis.

iii] How can the continuation of corporatist relationships within ACAS be explained?

On the surface there would appear to be a contradiction between the government's macroeconomic stance and stated approach to corporatism and the operation of ACAS arbitration. How can this apparent contradiction be explained?

First, it should not be assumed that corporatist strategies are impossible under a neo-liberal or free market approach to running the economy. As we have illustrated with the example of the MSC, corporatist strategies may indeed be necessary, at least in the short term, as one method of meeting a policy objective even within a free market culture. Also as others writers have discussed, corporatism can co-exist with other strategies, for example pluralism [Cawson, 1988] and dualism [Goldthorpe 1984].

Second, linked to the first factor, it can be useful for a government, and especially a government espousing the benefits of the free market, to distance itself directly from an industrial dispute, but to have another institution which is able to take a more conciliatory line should it become necessary. In other words, the government has to have some means at its disposal to rescue an industrial conflict, especially in the public sector, when it considers it cannot 'win'. That is, it is not just employers and trade unions in private sector disputes who may seek a means of 'not losing face' - the government may have need of such an arrangement. We could speculate that the more non-interventionist the government, then the increased likelihood of bitter industrial conflict and thus the greater need for an 'independent' organisation like ACAS to act as a form of damage limitation.

Third, while aspects of the government's labour market reform have impacted on the general climate of industrial relations, as workplace studies have highlighted, they have not necessarily altered the day-to-day relationships within some organisations. That is, the impact of the government's legislation has not been universal. For example, evidence would suggest that companies which did recognise trade

unions in the past continue to do so, and which did have procedures for dispute resolution have maintained them [Kelly, 1989; Metcalf, 1990]. Therefore, the practice of industrial relations within many companies has remained largely unaltered by the change in government and their approach to trade union reform.

Fourth, the continuation of corporatist relationships in arbitration may represent an example of the dualism described by Goldthorpe [1984]. At the macroeconomic level the government is excluding trade unions from decision-making processes and enacting legislation to free the labour market, but at the meso or micro level relationships between employers and unions in many organisations has not undergone a dramatic change. Both parties continue to recognise the mutual advantages in pursuing a policy of co-operation and consensus and in bringing differences to arbitration. This is not to assume that there will not be tensions between the two strategies from time to time.

Fifth, there may, of course, be no other option for parties to continue this form of relationship, because, as we have discussed above, there has been a growing tendency to write-in arbitration as a final stage in dispute resolution. Such a practice in industrial relations is likely to ensure a certain continuity of practice regardless of the industrial relations policies of any particular administration in power. It is possible then that nay changes which may occur in such practice will only occur in the longer term.

Finally, as Crouch [1985] recognises once certain relationships have built up over a period of time they are not easily changed. In the case of arbitration we have traced the development of relationships over time and the role of the state in providing arrangements for dispute resolution. Therefore, in spite of the government's rhetoric it is difficult to foresee that they could dispense with a system for resolving disputes which has existed in some form for over one hundred years, although whether the government will continue to provide such a service under the auspices of ACAS is a matter for speculation.

This leads on to the question of why ACAS itself has survived the election of the Conservative government, which is one of the topics for the next and final chapter.

Summary

It has been argued in this chapter that corporatism is a useful but limited concept for understanding the practice of ACAS arbitration. By employing definitions of corporatism advanced by different theorists, we have identified elements of both corporatism and pluralism in the arbitral relationships between the civil servants, arbitrators and the parties to disputes. The precise label we attach to this relationship will depend to a large extent on the particular definition applied.

In spite of the Conservative government's approach to macroeconomic management and industrial relations reform, we have observed little impact of the changes since 1979 on the operation and outcome of ACAS arbitration. Therefore, contrary to developments at the macroeconomic level, elements of corporatist relationships which were identified continue to exist.

Finally, we have advanced some explanations for the apparent continuity of practice in ACAS arbitration since 1979.

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1 During interviews with ACAS officials, they stated that they had discussion with civil servants in the Department of Employment responsible for drafting industrial relations legislation. They mentioned, in particular, the difficulties encountered by D/E officials when they attempted to draft legislation banning strikes in 'essential services'. In the event, no such legislation has yet been presented to the House of Commons.

2 ACAS was one of the organisations which responded to the government's Consultative Paper on Wages Councils issued in March 1985. For discussion of the reform of Wages Councils, see Brown, 1988a.

3 Evidence from work-place studies in the 1980's would appear to support the view that not all employers have adopted a more confrontational approach to industrial relations. For example, Coates, 1989 refers to the study conducted by Brown et al [1981] which was replicated and extended in the mid-1980's. From this study Coates argues that: ". . . it emerged that little had changed during the early Thatcher years. Union recognition remained extensive, collective bargaining for pay was stable everywhere except in manufacturing . . . and the system of shop stewards remained firmly intact [p.141].

4 See discussion of pluralism by Hyman, 1989, chapter 3.

5 See details of responses to questions and comments in Appendix III and discussion in Chapter 5 above.

6 In order to maintain the 'voluntarist' principle and to secure the acceptability of the arbitration award, it is ACAS policy to encourage joint references, so that neither party perceives that they were 'forced' into this form of third party dispute resolution.

7 The evidence gained from the survey of parties would indicate that even when one party 'lost' the arbitration reference they were prepared to use the service in a similar dispute in the future; in addition comments to this effect were made by respondents - see Appendix III.

8 Trade union officials and employers' representatives who are regular users of the service do build up knowledge, experience and recognition from their involvement in arbitration. In addition, the arbitrators themselves derive expertise and a degree of status from the role which they play. Because of the rather closed nature of the whole arbitration process and the practice of non-publicity surrounding the arbitrators themselves, the status which participants gain is normally confined to within the small group of people who are most directly involved. There are, of course, a small number of key figures who enjoy broader recognition in the media.

9 See Table 1.1 for breakdown of number of cases coming to arbitration. Also see Appendix III for support for arbitration from users of the service.

10 Information gained from discussion with ACAS officials and work experience in ACAS itself.

11 See discussion in Chapter 5 above.

12 See, for example, Bassett [1986], MacInness [1987], Coates [1989] and summary of debate in Longstreth [1988].

13 Evidence from discussion with ACAS staff. These issues were sometimes raised at Arbitrators' Seminars. It was the majority view that ACAS should resist pressure to charge for its services, as this could prejudice future use.

CHAPTER 7

CONCLUDING DISCUSSION

INTRODUCTION

Expanding the themes outlined in Chapter 6 to explain why corporatist relationships within ACAS have survived the election of three consecutive Conservative administrations, this chapter will explore the reasons which can be offered to explain the continued existence of the organisation.

A second objective is to consider the future prospects for ACAS and the different services which it provides. To some extent future developments will be dependent on the result of the next general election, the outcome of which is the subject of another debate outside the scope of this thesis.

Finally, conclusions derived from the context, evidence and implications of this study of ACAS arbitration will be advanced. It will be argued that, in spite of the changed climate in which ACAS has operated and the drive by ACAS officials to standardise conventions and practice and to increase the efficiency and professionalism of the service, there is a substantial degree of continuity in the operation of arbitration. This continuity can be explained in the context of the long history of arbitration in British industrial relations.

i] The survival of ACAS

> "Those who thought that the arrival of a Conservative government would mean curtains for ACAS have been confounded."
>
> [Lowry, 1990b, p.6]

When it came to power in 1979, the first Thatcher government made no secret of its dislike for quangos. As Pliatzky [1989] discusses, in its backlash against quangos, the government set up a review of these bodies in 1979. Pliatzky argues that the government's attitude to these non-governmental bodies can be explained by three factors. First, hostility towards quangos came from a section of the government's own supporters who viewed quangos as a growing extension of government. Such developments were said to result in an expanding, but unseen, number of civil servants, a tendency which was counter to the government's stated policy to limit the size of government bureaucracy. Second, it was contended that quangos were an undesirable form of patronage; and third, that government ministries should be more accountable to parliament for all their interventions in the market-place. Pliatzky notes a contradiction in government policy, however, for while the government reduced the role of or abolished some bodies, it also established other such organisations.

Given that ACAS is funded by government and, with very few exceptions, is staffed by civil servants, some commentators speculated on the continued existence of the organisation or how long it could survive without privatisation of its functions under the new administration [Torode 1984]. Others noted with some surprise that ACAS had survived the change of government relatively intact:

> "Given that environment of uncertainty and rapid change the first accolade I would award ACAS on its tenth anniversary is for still being there; more than that, fulfilling the role prescribed for it at the outset with a marked degree of consistency."
>
> [Clavert, 1984, p.5]

Although Pliatzky [1989] and other authors refer to the survival of ACAS post-1979, they do not explore the reasons for the government's decision not to abolish this particular quango. This issue was touched on briefly by Pat Lowry [1990a], former Chairman of ACAS, in his recent book on employment disputes and the involvement of a third party. Lowry surveyed the different forms of third party intervention in British industrial relations and in recording the sustained number of advisory, conciliation and arbitration cases dealt with by ACAS during its years of operation, notes that:

> "From such figures as these it might be assumed that the future of ACAS as an effective peace-maker was never in doubt."
>
> [Lowry, 1990a, p.192]

However, Lowry states that ACAS's future was in doubt with the election of Mrs Thatcher and the adoption of policies to de-regulate the labour market. Although Lowry asks why it was that ACAS did survive, he does not fully develop his analysis. His main argument is that politicians of all parties are now aware that as much criticism as kudos can be gained from personal involvement in major disputes, and that, therefore, it is better for government to distance itself as far as possible from the conflict. The government can then criticise or make comments, just like anyone else, from the sidelines of the dispute.

The question of the survival of ACAS was one question which was explored during this research project in interviews with ACAS officials and arbitrators. It is unlikely that there is one single factor which can provide a satisfactory explanation for the durability of ACAS. Rather a number or all of the undernoted reasons could have contributed to the survival of the organisation. These can be categorised under five main headings, namely the strategic use of a quango; the role played by the

leadership of ACAS; the support which ACAS enjoys from the users of the Service; ACAS's ability to respond to changing conditions; and the low cost of maintaining the Service.

[a] Strategic use of a quango

First, in support of Lowry's argument that governments may wish to distance themselves from industrial disputes, it is reasonable to suppose that the government would not wish to return the contentious issue of dispute resolution to within the control and responsibility of the Department of Employment. Senior officials in ACAS recalled a vist from Norman Tebbit when he first became Employment Minister. Apparently he came to see for himself the type of work which was carried out by ACAS and is said to have remarked - 'If ACAS did not exist we would have to invent it.'[1] Whether or not Mr Tebbit was sincere in his statement, it is clear that most governments and particularly a government which prides itself in non-intervention in industrial disputes, would wish to be seen to be distancing themselves from major disputes. As the quotation from Hood and Wright [1981][2] illustrates, a non-departmental body can fulfil a strategic role for the government. In this case ACAS provides a welcome buffer for governments at certain stages of disputes. A supposedly free market government can assert that it is up to the parties to resolve the differences between them and if they fail to do so there is an 'independent' organisation which can come to their assistance. There is evidence that the government has used such public relations tactics either in rejecting the use of arbitration in some disputes or in asserting that there is no need for strike action in other disputes because ACAS is available to resolve differences between the parties[3] .

The government can thus distance itself from the consequences of conflict situations if they wish to do so. One could argue that it is even more important for a neo-liberal government pursuing free market solutions to have such an organisation at its disposal. The more the government moves towards the contestation model identified by Crouch or conflict strategy, ironically the more the government is in need of a non-departmental institution as a damage limitation device. The alternative for the

government would be to resort to the use of the law as a means of resolving disputes. For example, the government could pursue legislation to make arbitration compulsory as an alternative to strike action, but there are often disputes where the government is prepared to allow a strike to run its course and would not wish to invoke arbitration procedures. Therefore, given the historical experience of compulsory arbitration and given the danger that in a different economic climate, unions could gain from compulsion, it is unlikely that the government would wish to adopt such an option. However, this was an option recommended to the government by the Institute of Directors, who called for the introduction of compulsory and binding arbitration in essential services in the public sector:

> "An alternative to cooling off periods, and one which the Institute finds more attractive, is binding arbitration. This would be built into procedure agreements in essential services as a last stage to be reached only when all other provisions have been tried and had failed. .... The special circumstances under which essential services operate, however, make it necessary to compel arbitration if that is the only way of preventing disruption."
>
> [Institute of Directors, 1984, p.6].

Linked to the last point, another explanation could be that ACAS is being tolerated as an institution which is largely cosmetic and has little impact on British industrial relations. Because it is a relatively weak organisation, it cannot act as a constraint on government policy. Therefore, there would be little rationale for abolishing it. Alternatively, as more of industry is being returned to the private sector it could be argued that any power which ACAS had has been diminished significantly since 1979. Under this scenario the market would be the final determinant of industrial conflict between employers and workers. Thus the government would not need to intervene directly in ACAS's destruction, but could allow structural and political changes to weaken the institution over time.

Further the rejection of a formal incomes policy and the abolition of Section ll and Schedule ll of the Employment Act, 1975, meant that ACAS was removed from the more contentious areas of its activity, that is potential deviation from pay guidelines, trade union recognition issues and claims for

the observation of relevant terms and conditions of employment for workers in a specific industry. With their removal, ACAS returned to work which was mainly a continuation of the work carried out by the state during the whole history of conciliation and arbitration, and which did not threaten the government's labour market policies. Therefore, the institution could be retained to fulfil a strategic role when required, but was not powerful enough to threaten or constrain the implementation of government policy.

[b] The role of the leadership of ACAS

Some have attributed the continuation of the service to the skills of the chairmanship of Jim Mortimer, Sir Pat Lowry and latterly Douglas Smith and also to the expertise of senior officials such as Dennis Boyd[4]. Through their leadership it is argued that ACAS has been able to walk the tight line between meeting the needs of the parties who come to them as an 'independent' body for assistance; and sensitivity to the views of government towards industrial relations.

It would appear from the continued use of the Service since 1979 that there is still a substantial degree of confidence in the organisation from both sides of industry. Further from the survey of parties to arbitration conducted as part of this research, it was clear that, although a small minority of trade union representatives were of the view that ACAS was more pro-employer since the election of the first Thatcher government, this did not prejudice their use of the Service. It is considered that the leadership of ACAS have been instrumental in maintaining support from users of the Service, because of the direct role they play in major industrial disputes, but also because of the relationship they have built up with the trade union movement and representatives of industry.

The leadership also maintain communication links with government Ministers responsible for employment and industrial relations affairs. The bringing in, for example, of new Employment Ministers to see what actually happens in ACAS would be one example of this. Further, as part of

the Whitehall community, it is reasonable to assume that senior ACAS officials also maintain some form of contact with their counterparts in the Department of Employment. This is especially so in the case of the present Chairman, Douglas Smith, who, unlike Jim Mortimer and Pat Lowry,[5] was a senior civil servant himself in the Department of Employment before being appointed to ACAS in 1987. According to Lowry [1990a], because of this departure from past practice, it was argued by some that in the future ACAS would "dance more readily to the government tune.". Lowry argues that they were mistaken, because:

> "Happily for ACAS, these critics would not have been aware of the experience, skill and, above all, integrity of the individual concerned."
>
> [Lowry, 1990a, p.193][].

Chairmen of ACAS and the Chief Conciliation Officer also have a strategic role in leading the ACAS Council. They have had to head this tripartite body through sometimes difficult periods in the last eleven years. Two incidents, the withdrawal of trade union recognition and membership rights at the Government Communication Headquarters [GCHQ] at Cheltenham [ACAS, Annual Report, 1984], and the issue of letters to workers who had been dismissed for taking strike action in the News International [or Wapping] dispute [ACAS, Annual Report, 1986], both strained relations on the Council and in particular between the TUC and ACAS.

The first incident resulted in the threatened withdrawal of support for ACAS, and other tripartite bodies, by the TUC, when a senior ACAS official, John Lambert[6], was recalled by the Department of Employment and sent to Cheltenham to advise management on the establishment of a staff association to replace the trades union at GCHQ. It was felt by some that ACAS management should have stood firm against the request from the Department of Employment and refused to allow John Lambert to take on this unenviable task. The secondment of an ACAS official in this way exacerbated trade union anger at the government's decision to abolish unions at GCHQ and also resulted in a protest and questions in the House of Commons

ACAS Council responded by issuing a press statement on the following lines:

> "The Council attach great importance to the Service's deserved reputation for integrity and even-handedness in disputes and to the impartiality of ACAS staff. They will be requesting a meeting with the Secretary of State for Employment to make clear their view that the Service has been placed in an invidious position by this incident and that senior members of ACAS staff should not be withdrawn by the Department of Employment in this way."
>
> [ACAS, 15 March 1984]

In the event John Lambert did go to GCHQ, and after discussions with the TUC, it was agreed that Lambert should not return to ACAS after he had fulfilled his duties. In return the TUC agreed to continue its representation on ACAS Council.

The second incident which called for leadership skills involved events surrounding the News International Dispute. The company rejected attempts by ACAS at collective conciliation and dismissed employees who had taken strike action. A majority of the ex-workers, 4,700 out of a total of 5,300, then made complaints of unfair dismissal to an Industrial Tribunal, which resulted in ACAS's individual conciliation branch becoming involved. In the meantime, although the company's proposed offer of a settlement was rejected twice following ballots of the dismissed employees, the company wrote directly to individual ex-employees offering them a settlement based on its final offer. This was accepted by 1,700 workers. In addition the company requested ACAS's assistance in concluding settlements. ACAS was then involved in issuing a statement to all dismissed employees explaining the ACAS role and the implications of accepting the employer's offer [ACAS, Annual Report, 1986].

This matter was raised, by a representative from the TUC, and discussed at an ACAS Council meeting attended by this researcher. The representative from the TUC, John Monks, expressed the movement's concern about this development, arguing that it was a very serious issue which could further damage relationships between the TUC and ACAS. The TUC's view was that ACAS's involvement could be interpreted as undermining the strike and encouraging other employers to take similar action against their employees. In response the chairman and other senior ACAS officials explained the

circumstances of ACAS's involvement and their view that they had a statutory obligation to provide individual conciliation assistance. The matter was deferred on the understanding that discussions would subsequently take place between ACAS officials and the representatives of the trade unions involved in the dispute and the TUC. In the days that followed, meetings did occur and again the threatened withdrawal of the TUC was prevented.

Because these two incidents were considered to be against the general interests of the union movement, it is not surprising that the TUC expressed its disapproval. There is less evidence, however, of similar rifts with the CBI, and ACAS Annual Reports post-1979 make reference to the different reactions of the trade unions and CBI to the government's contentious industrial relations reforms. That is, there is recognition in the Reports that the trade union reforms were less likely to gain support from the TUC, and that there had been a shift in the balance of power in industrial relations in favour of employers.

However, one minor difference which did occur between the CBI representatives and ACAS officials on the Council related to the drafting of the Annual Report for 1985 [7]. In the original draft the document referred to the new 'macho' style of management which was being employed in some sectors of the labour market as a response to the economic recession and rising unemployment in the 1980s. The CBI representatives objected to the reference to macho management on the grounds that the behaviour of a few should not be interpreted as a general trend. The issue was debated with the chairman expressing the view that it was necessary to refer to the fact that some managers were taking a harder industrial relations line and in some cases had not been respecting procedure agreements. The result was that the Annual Report was amended and instead referred to the "mixed evidence" relating to management styles and responses in the 1980s [ACAS, Annual Report, 1985].

Clearly the management of these sensitive issues required considerable skill on the part of the senior officials involved. However, their expertise is also exercised very directly in the resolution of major industrial disputes. Dennis Boyd in particular has gained the respect and confidence of parties, both

employers and trade unions, who have had direct dealings with him. This is evidenced in the regard with which he is held by the staff of ACAS and arbitrators who have had contact with him[8].

Both the chairman and senior officials play an important public relations role in speaking at industrial relations events, to political parties and other organisations; in attending party conferences; and liaising with the media. They are also called on from time to time to meet representatives from other countries or to visit other countries to outline the role and function of ACAS[9].

[c] Support for ACAS

In spite of difficulties which ACAS may have encountered in the past eleven years, and the incidents which strained relationships discussed in the context of the skill of the leadership above, ACAS has maintained the general support of the TUC and the CBI. Also in spite of the more confrontational climate in which it has operated in the 1980s, ACAS's Annual Reports, which are endorsed by all members of the Council, refer to ACAS's policy of reducing conflict in industrial relations and wherever possible settling disputes by voluntary means without the intervention of the law .

As is also evident from this and other studies, the users of the advisory, conciliation and arbitration functions of ACAS have expressed considerable support for the organisation and its work. As discussed in the summaries of the previous research into the different services offered by ACAS in Chapter 1 above, a common feature of these studies was the high level of regard for the service displayed by the users and their preparedness to come to ACAS again in the event of a similar issue arising in the future. For example, the evidence from the survey of the advisory service conducted by Armstrong and Lucas [1985] demonstrated over ninety per cent rates of satisfaction and willingness to the use the service again. The work carried out by Dickens et al [1983] into individual conciliation also uncovered a high regard for the service from both sides involved.

Similarly, as outlined in previous chapters, the study of arbitration carried out as part of this project, has revealed that a large majority of both management and trade union representatives considered that the outcome of the arbitration was fair, were satisfied with their experience of the use of arbitration and would use the service if a similar dispute arose again[10].

However, as other organisations have witnessed in the 1980s, support for an institution alone - even consumer support - is not a sufficient condition to guarantee its continued existence.

[d] Responsiveness to change

Although as discussed above, many aspects of ACAS's work and the ongoing debates within the service have not altered significantly over time, ACAS has been sensitive and responsive to the changing political climate. The 1979 Annual Report noted the potential effect of the change of government with a different approach to economic and political matters, their new programme of industrial relations reform and the abandonment of a formal incomes policy:

> "These developments, though not changing the functions undertaken by ACAS, did influence substantially the general atmosphere in which the Service operated."
>
> [ACAS, Annual Report, 1979, p.7]

ACAS Council was also sensitive in its response to the changed conditions of the 1980s. For example, given the controversial nature of some aspects of the government's trade union legislation, ACAS Council distanced itself from commenting, at the consultative stage, on the more contentious elements of the government's industrial relations reform:

> "The Council offered no comments during the consultation on the provisions of the Act [1980 Employment Act] and of the codes of practice, mainly on the grounds that to do so could prejudice the acceptability of the Service to both sides of industry on issues where views were so widely divergent."
>
> [ACAS, Annual Report, 1980, p.9]

ACAS's ability to respond to the changing climate of a new 'radical' administration and in securing the acceptability of the two sides of industry, was commented on by Wootton:

> "The appointment by the Labour government in 1975 of the independent advisory council familiarly known as ACAS was a landmark. The subsequent indefatigable activity of ACAS itself under succeeding governments, regardless of their political complexion, has been astounding."
>
> [Wootton, 1983]

In addition, ACAS has been concerned to increase the professionalism and efficiency of the service which it offers. One illustration of this was identified in the changes which it has implemented in the delivery of the arbitration service and the emphasis given to the selection and training of arbitrators and ACAS personnel[11] . The attention given to improving the professionalism and efficiency of the service can be interpreted within the context of civil service reviews implemented by the government in the 1980s and the hiving-off of some civil service functions to the private sector. In other words, it can be seen as a defensive strategy.

Similarly, the opening up of some of ACAS's files to academic research and the support for the surveys carried out into the different functions, can be interpreted as one method of improving the service's accountability and making it less vulnerable to attack from hostile sources. As noted, in the past there was strong resistance from ACAS officials to allowing researchers to approach the parties to arbitration, because of the concern that any such approach could re-kindle the conflict. Policy on this issue altered with the approval given to conduct the survey of parties to arbitration in 1988.

[e] Cost to the Exchequer

Lastly, it must be remembered that the cost of running the service with a Budget of around 16 million pounds currently, is so low in public expenditure terms that the government could not make a major financial saving by abolishing ACAS. In value for money terms the argument for retaining ACAS is very strong indeed. Commenting in 1984, when the ACAS Budget was of the order of 12 million pounds, Calvert argued that given ACAS's significant role in collective conciliation and its success in 'professionalising' its work:

> "A stronger ACAS with more precise terms of reference for conciliating and advising will continue to make a major contribution and at £12 million a year is cheap at the price."
>
> [Calvert, 1984, p.5]

It is impossible to calculate with any accuracy the cost to the Exchequer of not having an institution like ACAS or some machinery for third party dispute resolution. However, in most industrial disputes which could potentially result in strike action, even conservative estimates of the cost of non-intervention are likely to exceed ACAS's current Budget.

While the factors cited above may have contributed to the explanation for the survival of ACAS, it should be re-emphasised that the state has a long history of third party intervention in industrial dispute resolution in Britain and it is highly unlikely that any government would or could abandon this role entirely. Nevertheless it is not necessary for this intervention to take the form of a tripartite body such as ACAS. The next question to be considered, therefore, is what are the future prospects for ACAS.

ii) Future Prospects

> "Looking ahead, all the major parties are supportive and interested in extending the work of conciliation, arbitration and ACAS."

The above statement was made by Richard Harrison, former Director of Collective Conciliation and Arbitration, in his speech to the arbitrators' seminar in Edinburgh in 1986. The grounds for Harrison's optimism were that, first a joint document prepared by the Labour Party and TUC - 'People at Work' - expressed a commitment to strengthen ACAS and the role of conciliation and arbitration machinery in a future Labour government. Second, that the SDP had prepared a consultative paper for their party conference which envisaged an expansion in the role of arbitration and contained a proposal for non-binding arbitration. Dennis Boyd had also been invited to speak to a fringe meeting of the party at their conference. Finally Harrison argued that the Conservative government had become increasingly supportive of ACAS's work and cited the teachers' dispute and the fact that arbitration was being considered as an alternative to Industrial Tribunals in dismissal cases, as evidence to substantiate his remarks.

Given developments since 1986, including the demise of the SDP, Harrison's comments demonstrate the pitfalls in looking too far into the future. Also I doubt wheher the confidence expressed by Harrison in the support from the Conservative Party for arbitration in 1986 would be as strong today. Since 1986, the government has been openly hostile to arbitration as a form of dispute resolution in, for example, the ambulance dispute. Therefore, the government has a tendency to blow hot and cold on the arbitration issue depending on the dispute in question.

I shall not enter into predicting the future but rather shall make some tentative observations about possible future trends.

As has been discussed the need for some form of dispute resolution machinery is likely to continue. For example in relation to arbitration, Wootton argues that arbitration is preferable to industrial strikes:

> "Inevitably, therefore, we are led to the conclusion that as long as conditions of employment are generally determined by collective bargaining, there ought to be some last resort system of arbitration in cases where the parties, having failed to come to terms, are falling back on force."
>
> [Wootton, 1983]

The issue for this thesis is whether it should take the form of a tripartite, independent body such as ACAS. As outlined earlier there is a strong level of support for the service from its users; commentators have argued for the expansion and extended use of arbitration [Johnston, 1975; Meade, 1982; Wootton, 1983; Rideout, 1989; Lowry, 1990a]; and there is likely to be reluctance on the part of any government to return the functions of ACAS back to the Department of Employment. Yet much will depend on trends and developments in the economy, not all of which will be within the control of the present or future governments. To some extent future prospects may also be determined by the outcome of the next general election and developments in Europe, such as the introduction of the Social Charter[12].

Should the Conservative Party win the next election, the abolition of ACAS could not be ruled out. However, it is more probable that the government will leave the service largely untouched but will continue to put restraints on its Budget. One possibility, although there will be strong resistance to such a move, would be for the government to introduce charges for some aspects of ACAS's work, especially the advisory function.

The government may continue its practice of tackling the perceived problem of public sector pay through more indirect methods such as restricting public expenditure, fragmenting national pay bargaining and further privatisations. The electricity industry is in the process of privatisation and it is possible that the coal and railway industries will follow should the Conservatives win the next general election. In these circumstances there will be less political pressure on the government to set

up additional Pay Review Bodies or Arbitration Boards to settle major disputes. Some commentators have suggested that the government has used this indirect approach to imposing pay restraint rather than pursue its proposed legislation to ban strikes over pay in essential services . At present there would appear to be no incentive for the government to change its policy in this respect.

Noting his concern at the Conservative government's withdrawal of the rights of some public sector workers to settle disputes by arbitration, Lowry comments:

> "There is surely a case for actively encouraging the wider use of arbitration in disputes affecting one large and important group of workers, namely those covered in the non-trading part of the public sector."
>
> [Lowry, 1990a, p.85]

The public sector workers to which Lowry was referring include civil servants, school teachers and National Health Service employees.

Commenting further on the role of ACAS under a Conservative administration, Lowry notes that there are developments which could "give rise for concern for the future of ACAS." (Lowry, 1990a, p.193]. Lowry argues that, although the relevant statute makes clear that ACAS should be separate from and not subject to directions of any kind from any Minister of the Crown in relation to the way it operates, there is nothing to prevent central government from duplicating functions of ACAS or taking upon itself responsibilities which ACAS currently has. He cites the change which has occurred over the issue of Codes of Practice, where, in spite of the fact that ACAS's powers to issue these Codes have not altered in theory, the government has adopted the practice of issuing its own Codes. Further, he records that ACAS's power with regard to Wages Councils has been diminished, as the service is no longer required to conduct an enquiry before a Wages Council can be established, reformed or abolished. Therefore, while Lowry does not anticipate the demise of ACAS, he is nervous about its potential future role under a Conservative administration.

Should Labour win the next general election, the role and functions of ACAS could be expanded to assist the implementation of the party's proposed industrial relations policy, for example the enhancement of rights at work for part-time workers. Also depending on Labour's approach to the European Social Contract, ACAS may be given a role in encouraging implementation of the conditions and recommendations laid down in the Charter. Any such expansion would not necessarily imply an increased role for arbitration, unless the party decides to reform the Industrial Tribunal system and use arbitration in dismissal disputes. Ironically, should Labour move along the road of improving workers' rights, they may encounter opposition and resistance from employers which could threaten the support which ACAS has from both sides of industry. Clearly employers would have to be persuaded that it was in their interests also to pursue such policies especially in the new economic environment which will follow the introduction of the Single European Market in 1992.

Debates at the 1990 TUC and Labour Party conferences would indicate that support for entering into a co-operative and consensual relationship with employers is strong within the labour movement. For example a discussion document published jointly by the GMB and the UCW [1990] and presented by their General Secretaries, John Edmonds and Alan Tuffin respectively, advocates a joint trade union and employer approach to the problems of the 1990's. Referring to the system of wage bargaining in Britain, the authors argue for an annual pay round affecting all workers where:

> "a consensus view is reached about the overall scope for pay rises which conditions negotiations and influences settlements, notably by affecting the going rate set in each pay round."

Linking the question of pay with the control of inflation, Edmonds and Tuffin state:

> "Our fight against inflation could be strengthened if more of our major negotiations on pay and conditions of employment were concentrated in the first three months of the year following a public discussion between the Government, CBI and TUC of Britain's economic prospects. This discussion could be launched by the publication of the Government's annual autumn statement on the economy. Pay settlements would be more likely to fall within a range which the *social partners* [my emphasis] accept as consistent with *national needs* [my emphasis]."
>
> [GMB and UCW, 1990, p.9]

Such rhetoric sounds very much like the 1970s and the social contract revisited. It could be argued that it reflects the ethos of partnership with industry and responsiveness to economic change which is prevalent in the Labour Party's Policy Review and evident in proposals for a National Economic Assessment[13].

In summary, whatever the outcome of the next general election it is difficult to envisage that ACAS will be abolished, but stranger things have happened. What is clear is that whichever party is elected they will still have a problem which has taxed governments over more than one hundred years and that is how to resolve the conflict between capital and labour. Like the state itself, this is an issue which is not likely to fade away.

[iii] Conclusions

The aims of this thesis were to conduct a detailed survey of ACAS arbitration, to build on the research which had already been carried out in this area and to add to the general body of knowledge in this relatively under-researched field of study. More specifically, the objectives of this study were to analyse the operations of ACAS arbitration within the context of the ongoing corporatist debate, the history of the state's involvement in third party intervention, and the changed political, economic and social conditions which followed the election of the first Thatcher government in 1979. The reasons for the survival of ACAS in an apparently hostile climate were also explored. A major theme of this research was to examine the extent to which the practice of ACAS arbitration and the role of the main actors involved, represented a significant departure from or continuity with past practice.

Our conclusions were that, although there had been changes in some of these aspects, in the main the practice of ACAS arbitration has displayed a remarkable degree of continuity with the history of the state's involvement in arbitration. What we discovered was that the system is supported by a whole network of relationships between representatives of employers, trade unions and the state; and between the representatives of the state and arbitrators. Together they pursue a common objective of reducing the perceived costs of conflict by adopting a co-operative and consensual approach to dispute resolution.

Although it has been possible to gather a substantial body of evidence from the two questionnaire surveys of arbitrators and parties to arbitration; the summary of arbitration awards over the period 1942-85; interviews with civil servants and arbitrators; and the experience of working within ACAS, attending hearings, seminars and Council meetings, there are limitations to the approach adopted. For example, it was not possible to compile an in-depth analysis of the outcome of arbitration hearings, partially because of the lack of available background papers. The choice of a one in ten sample across the whole range of issues which come to arbitration, meant that the sample size was small in the earlier years examined. In addition, as the questionnaire surveys and summary of awards were not conducted in exactly the same period, the evidence obtained from these studies could not be matched

directly. Further, because of the breadth of the topic covered and the numerous and complex debates which underly the main theme of this study, there are issues which could not be explored and developed in this thesis. Rather this work is more concerned with identifying broad patterns and general tendencies and trends over time, which leaves room for more detailed case study approaches.

In Part I [chapters 1 and 2] the context for the current study and examination of arbitration was established. In chapter 1 the literature on corporatism, third party intervention and the role of arbitration was reviewed. It was argued, first that there were problems in applying the theoretical discussions on corporatism to arbitration, and second that there were major gaps in the available evidence and knowledge of arbitration.

There are difficulties in analysing the role of any institution or set of relationships in isolation. Chapter 2, therefore, sets current debates within the historical development of arbitration in British industrial relations and the wider political and economic conditions in which arbitration operated. It was established that the use of arbitration as one form of third party intervention can be traced as far back as the year 1800, and that current arbitration practice has its foundations in the 1896 Conciliation Act. Attempts in the past to introduce and enforce compulsory arbitration were unsuccessful. Instead support for voluntary arbitration and the 'voluntarist' principle are to be found among practitioners and users of the service. The changing political and economic climate in which arbitration operated in the post-war period was also reviewed. The implications of the stated rejection of the post-war Keynesian consensus in favour of economic management based on monetarist principles were discussed and the potential impact of the present government's approach to industrial relations and labour market policy assessed.

The evidence gathered from the two questionnaire surveys and the review of arbitration awards are discussed in Part II [chapters 3, 4 and 5]. In these chapters we shed some light on the background and attitudes of the men and women who are appointed as ACAS arbitrators and the way in which they are recruited, selected and trained to carry out their tasks. It was suggested that, although at first sight

there appeared to be a shift in practice in the recruitment and training of arbitrators, on further investigation it was argued that any such changes reflected general trends relating to the representation of different social classes in positions of authority; and that arbitrators were selected for their previous experience and acceptance of the prevailing economic orthodoxy. broadly defined.

In chapter 4 we were concerned to examine the whole process of arbitration including a review of the parties who come to arbitration; the issues which are the subject of arbitration references; the constraints imposed on the arbitrators via the terms of reference; and the conduct of arbitration hearings. We identified a number of similarities between current and past trends in relation to the users of arbitration and the issues involved. We observed, however, a more interventionist role for the civil servants in establishing and maintaining a set of conventions surrounding the drawing up of terms of reference and procedural conventions relating to the preparation for the hearing and the conduct of the hearing itself.

Using evidence from the survey of arbitration awards and the questionnaire surveys, the outcome of the whole process, the arbitrators' awards, was evaluated in chapter 5. It was contended that many of the discussions and debates surrounding the making of decisions, the conventions about giving reasons and recommendations, and the criticisms sometimes levied at arbitration are not new. It was noted that the criteria adopted by arbitrators in reaching their awards remain difficult to identify; but it was argued, from the available evidence, that many of the criticisms made of arbitration are not readily supportable. It was also observed that the alternative to arbitration may be a costly dispute which both parties and/or the state may wish to avoid.

Finally, in Part III [chapters 6 and 7] we examined ACAS arbitration in the context of the corporatist debate and asked whether the Thatcher governments' stated rejection of corporatism and attack on trade union power had impacted on the work of this service. The reasons which could explain the survival of ACAS, in what may be described as a hostile climate, were also explored. Elements of both corporatist and pluralist relationships were identified in ACAS arbitration and it was suggested that

these have altered little since the change of government in 1979. A number of reasons were advanced to provide some explanation for the apparent contradiction between the government's declared macroeconomic policy stance and the continuation of corporatist relationships within ACAS. We ended by examining the factors which could account for the survival of a tripartite body like ACAS, and speculated about its future prospects.

While this research is based on the three surveys referred to, there is scope for further detailed study of the arbitration awards, especially with relation to the increasing focus and interest in pendulum or straight choice arbitration[14]. Second, one aspect of the study which emerged during the research was the crucial importance of the key civil servants in the whole process. A research project based on detailed interviews with civil servants involved in ACAS, both past and present would provide more insight into the role which they perform. Lastly, more evidence of party political views and the attitudes of key politicians towards ACAS would add to knowledge and understanding of this field of study.

On the basis of the evidence presented in this thesis,we can advance the following observations and tentative conclusions.

The practice of present day arbitration displays a remarkable degree of continuity and consistency with past policy. First, the view that arbitration should only be used as a last resort or final stage in negotiations has been sustained over the period. It is based on the principles of free collective bargaining and a voluntarist approach to dispute resolution where it is considered that, if possible, parties should be responsible for reaching their own decisions.

Second, moves towards unilateral or compulsory arbitration have been rejected, unless under the unusual circumstances of war. The issue of compulsion has re-emerged at different times in history especially in response to economic recession and rising wage pressure. There is no absolute consensus on this issue between arbitrators and others who have an interest in this question. It is ACAS's policy

to discourage such moves towards compulsory arbitration on the grounds that they could exacerbate industrial relations problems. As has been discussed, current government policy is also against the use of compulsion in this area, but for different reasons.

Third, issues such as giving reasons for decisions or making recommendations to the parties have been debated over time. Again there are differences of opinion on these matters, but the present balance of opinion supports traditional arbitration practice which holds that the giving of reasons or recommendations should not be encouraged, again because they could prolong a dispute or endanger its acceptability to the parties.

Fourth, debates over the criteria for the appointment of arbitrators, the way they should conduct an arbitration, and the factors which they should bear in mind when reaching their decisions have continued over the period examined. One crucial area, the role of the common good or public interest in the outcome of arbitrations, is an issue which has remained unresolved. What was evident from the surveys was that arbitrators are appointed on the basis of their perceived independence and dis-association from either side to a dispute. Examination of awards revealed that arbitrators were not and are not social reformers intent on reversing perceived disadvantages of labour in the economy. Instead their awards are made within the constraint of the parties' terms of reference and within a particular view of political economy.

Fifth, the successful operation of arbitration is based on a whole network of relationships of trust and confidence between employers and trade unions who use the service and the civil servants who run ACAS. In addition both parties to a dispute normally represent different constituencies; act as intermediaries between the state and their members; and play a key role in ensuring the acceptance and implementation of arbitral decisions. Such relationships have been sustained over the whole history of arbitration.

In spite of the change in government in 1979 and its more radical and ideological stance on running the economy and labour market policy, we can observe that the operation of arbitration over the period examined has not been dominated by ideological differences between parties and this is reflected in the continuity of policy. As Lowry has argued:

> "For more than a century the independent third party had made an enormous contribution to the working of the British industrial relations system. There is no reason to suppose that this contribution will not be continued in the future."
>
> [Lowry, 1990a, p.198]

The general picture then is one of continuity *and* change. The evidence from this thesis would therefore support the old adage:

plus ca change, plus c'est la meme chose

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1 Information from interview with Dennis Boyd, Chief Conciliation Officer, ACAS.

2 See discussion in Chapter 6 above.

3 For example, in the Miners' dispute in 1984, it was contended by the Prime Minister that there was an adequate machinery available which the trade unions could use instead of maintaining their strike action.

4 This particular reason was quoted by some of the arbitrators I interviewed as a factor in the survival of ACAS.

5 Jim Mortimer was appointed the first Chairman of ACAS, in part because of his links with the labour movement. After the change of government in 1979, he was replaced by Pat Lowry who came to the Service with previous experience in industry. Neither Jim Mortimer or Pat Lowry were civil servants. The appointment of a civil servant, Douglas Smith, after the retiral of Pat Lowry in 1987 was, therefore, a departure from previous practice.

6 John Lambert was former Director of Conciliation and Arbitration. He was a supervisor of this doctoral thesis until his departure from ACAS. This researcher was working in ACAS during this rather tense period.

7 This researcher was present at the ACAS Council meeting at which this topic was raised and discussed.

8 A significant number of staff and arbitrators interviewed referred to the particular style, expertise and approach of Dennis Boyd and his role in maintaining the respect and confidence of parties who come to ACAS. Dennis Boyd also played a key role in staff training and the induction of arbitrators.

9 Dennis Boyd in his opening address at Arbitrators' Seminars often referred to this role, arguing that ACAS was viewed as a model of 'good practice' by representatives from other countries.

10 See detailed responses to questions in Appendix III.

11 See discussions in chapter 3 above.

12 In an article for Personnel Management, March 1990, Mark Hall highlights the key areas where European Community legislation is likely to impinge on British industrial relations practice.

13 See for example Labour Party documents including *Democratic Socialist Aims and Values, Meet the Challenge, Make the Change, Looking to the Future.*

14 Lowry [1990a] states that new style agreements with built in provision for pendulum arbitration are so few that their impact is relatively negligible. It is understood by the present researcher that David Metcalf from the London School of Economics has been awarded a research grant from the Department of Employment to conduct a study into final offer arbitration.

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3. *Time off for trade union duties and activities*

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Arbitration and Mediation
Collective Conciliation
The Law of Employment

LIST OF INTERVIEWS

ARBITRATORS:

Professor George Bain

Professor N Bosanquet

Dr Harcourt Concannon

Professor J Gennard

Professor L C Hunter

Professor T L Johnston

Mr A S Kerr [Retired Chief Conciliation Officer, ACAS]

Professor Sid Kessler

Lord McCarthy

Mr A I Marsh

Mr J H Mulholland

Dr Sarah Orr

Dr E Owen Smith

Professor R W Rideout

Mr K I Sams

Dr R Singh

Mr T Smith [Retired Ex-Director, ACAS]

Professor George Thomason

Mr Brian Towers

Sir J C Wood

Sir John Wordie

ACAS OFFICIALS:

David Askew, former Conciliation Officer

Dennis Boyd, Chief Conciliation Officer

Alastair Campbell, Arbitration Service

Richard Harrison, former Director Conciliation and Arbitration

John Lambert, former Director Conciliation and Arbitration

John Lockyer, former Arbitration Service

Sir Pat Lowry, former Chairman

Mike Mellish, [the late], former Director Conciliation and Arbitration

Les Parsisson, former Arbitration Service

Douglas Smith, Chairman

APPENDIX I

SURVEY OF ARBITRATION AND MEDIATION PROCEDURES

QUESTIONNAIRE RESULTS:

Introduction

A Questionnaire was issued to the 94 Arbitrators on ACAS's current list and 73 replies were received - a response rate of 78%. One reply was in letter form only, explaining that as the Arbitrator had been on the list for some time but had not been instructed to arbitrate, he felt he could not usefully complete the survey. The sample should, therefore, be reduced to 93 Arbitrators and 72 replies - a response rate of 77%. Two of the 72 Arbitrators who completed the Questionnaire are new to ACAS, and thus felt unable to complete the Questionnaire in full, answering Questions 1-7 (inclusive). Thus Questions 1-7 will relate to 72 responses; and Questions 8-28 will relate to 70 responses.

The Questionnaire was designed to obtain a straightforward Yes/No reply where this was appropriate; but also to obtain the attitudes and views of the Arbitrators. For this reason, many of the questions were open-ended and deliberately did not lead the Arbitrators, so that a wide range of views and comments could be expressed. Where possible, these views and comments were grouped together and specimen answers quoted. Full answers were given to some questions which related to the role of ACAS, where it was thought these would be useful for ACAS's purposes.

Analysis

(A) GENERAL BACKGROUND

1. Age:

Age Group	No of Arbitrators
35	2
36–45	9
46–55	20
56–65	29
66–71	12
	Total: 72

2. Education:

(a) **Where did you receive your secondary education?**

	No of Arbitrators
Grammar School (England)	37
Grammar School (Scottish or Welsh equivalent)	9
Non Grammar School	10
Public School	3
UK - type of school unspecified	9
Non UK - type of school unspecified	4
	Total: 72

Notes:

1. Ardrossan
   Bolton
   Dundee
   Edinburgh
   Glasgow
   London
   Manchester
   Middlesbrough
   Rotherham

2. Canada
   Johannesburg
   S Ireland
   Uganda

2. Education

(b) At what age did you leave full-time education?

Age	No of Arbitrators
14	5
15	2 + 2'R'
16	5
17	10
18	3 + 1'R'
19	3
20	-
21	11 + 1'R'
22	8
23	7
24	3 + 1'R'
25	2
26	4
27	2
28	-
29	1
'Never'	1
	Total: 72

('R' = Returned at later date to full-time education)

2. Education:

(c) **Did you receive post-school education, eg at College or University? Please specify.**

	No of Arbitrators
YES	68
NO	4
	Total: 72

Breakdown of 'Yes' response:

University/College	No of Arbitrators
Unspecified	12
Part-time courses	4
Open University	1
Art College	1
	18

of the remaining 50:

Cambridge	9
LSE	7
London	6
Manchester	6
Glasgow	4
Liverpool	4
Oxford	4
Edinburgh	2
Canada *	2
Durham	2
Ruskin	2
Sheffield	2
St Andrews	2
Birmingham	1
City	1
Lancaster	1
Leeds	1
Nottingham	1
Sussex	1
Wales *	1
USA *	1
	60 **

* Did not state which University

** Totals 60 because 10 Arbitrators had 2 Degrees from different Universities

3. Qualifications:

(a) **Do you have a degree from a University/College?**

	No of Arbitrators
YES	63
NO	9
	Total: 72

Breakdown of 'Yes' responses:

Type of Degree	No of Arbitrators
Not indicated	10
Unspecified	7
MA	18
BA	16
BSc	9
MSc	8
LLB	9
LLM	2
BCom	2
BEng	1
PhD	8
DPhil	2
MPhil	1
MBA	2
Postgraduate Degree unspecified	2
	Total: 97*

* Totals 97 as 28 Arbitrators had 2 or more degrees

Notes:

1. Unspecified -
   1 Economics and History
   1 Economics and Geography
   1 Classics and Geography
   1 Modern Languages
   1 Economics
   2 PPE

2. MAs -
   2 Economics
   1 Economics and Modern History
   1 History
   1 PPE and History

3. BAs -
   3 Economics
   1 Economics and Geography
   1 English

4. BScs - 6 Economics

5. MScs - 2 Economics and 1 Management Science

NB Although 68 Arbitrators had University/College education - see Question 2(c), only 63 obtained degrees

3. Qualifications:

(b) **Do you have legal qualifications?**

	No of Arbitrators
YES	12
NO	60
	Total: 72

Breakdown of 'Yes' Responses:

Type of Qualifications	No of Arbitrators
Barrister	7
Law Degrees	2
Postgraduate Diploma	1
Unspecified	2
	12

3. Qualifications:

(c) **Do you have other professional qualifications?**

	No of Arbitrators
YES	32
NO	40
	Total: 72

Breakdown of 'Yes' Responses:

Type of Qualifications	No of Arbitrators
FIPM/MIPM	18
Assoc of the RCIA	4
FBIM/MBIM	4
DipEd	2
CertEd	2
MEd	1
Teacher Training Cert	1
Associate of Inst of Bankers	1
Diploma in Management	1
IMS	1
HM Insp of Fact	1
FIME/MIME	2
AFIMA	1
AFRA Soc	1
FRINA	1
FIPE	1
FIIM	1
FIPrE	1
Unspecified	1
	45*

* Totals 45 as 13 Arbitrators had more than 1 qualification

FIPM/MIPM	-	Fellow or Member of the Institute of Personnel Management
RCIA	-	Royal Chartered Institute of Arbitrators
FBIM/MBIM	-	Fellow or Member of the British Institute of Management
IMS	-	Industrial Management Society, or Institute of Management Science
FIME/MIME	-	Fellow or Member of the Institute of Mechanical Engineers
AFIMA	-	Associate Fellow of the Industrial Marketing Association or International Management Association
AFRA Soc	-	Associate Fellow of the Royal Aeronautical Society
FRINA	-	Fellow of the Royal Institute of Naval Architects
FIPE	-	Fellow of the Institute of Plant Engineers
FIIM	-	Fellow of the Institute of Industrial Management
FIPr.E	-	Fellow of the Institute of Production Engineers

3. Qualifications:

(d) **Do you have other educational or industrial qualifications?**

	No of Arbitrators
YES	23
NO	48
No response	1
	Total: 72

Breakdown of 'Yes' Responses:

Type of Qualifications	No of Arbitrators
Certificates/Diplomas (eg in TU Studies, Personnel Management and Business Admin)	11
Postgraduate Degrees	7
Previous Work Experience	4
Membership of Associations	2
Conciliator for 20 yrs	1
Linguistics	2
	27*

* Totals 27 as 4 Arbitrators quoted more than 1 qualification

4. Experience:

(a) **Do you have industrial/commercial experience?**

	No of Arbitrators
YES	54
NO	18
	Total: 72

Breakdown of 'Yes' responses:

Work Experience	No of Arbitrators
Company or Industry - actual job unspecified	11
Banking, Insurance, CAs	5(1 as Partner: 1 as Economist: 1 x 1 yr: 1 x 1½ yrs: 1 x 5 yrs)
Engineering - actual job unspecified	2(1 x 4 yrs: 1 x 5 yrs)
Civil Service - actual job unspecified	4(1 x 17 yrs: 1 x 46 yrs)
Clerical	3(2 x 2 yrs: 1 x 4 yrs)
Personnel Management	8(1 x 10 yrs)
Management - general	4(1 x 2 yrs: 1 x 6 yrs)
Management - co Executive	1
Management - Directors	2
Journalist	1
Legal	1
Consultancy	1
Chairman of IR Court	1
Miner	3(1 x 3 yrs) 1 x 11 yrs)
Docker	1(1 x 11 yrs)
Printer	1
Shop Assistant	1
Vocational Work	3
Unspecified	4
	57*

* Totals 57 as 3 Arbitrators quoted more than 1 job

(-) No of years worked where quoted

Note:

1. As it is ACAS's policy only to appoint Arbitrators who have some industrial/commercial experience, it is assumed that some Arbitrators under-stated their experience.

4. Experience:

(b) Do you have management experience?

	No of Arbitrators
YES	49
NO	23
	Total: 72

Breakdown of 'Yes' responses:

Management Experience	No of Arbitrators
Industrial/Commercial	24
Civil Service	14
University/Education	10
HM Forces	3
Unspecified	2
	53*

* Totals 53 as 4 Arbitrators had experience in two fields

4. Experience:

(c) **Do you have experience as a trade union official?**

	No of Arbitrators
YES	25
NO	47
	Total: 72

Breakdown of 'Yes' Responses

TU Experience	No of Arbitrators
Lay officials (Chair, Sec, Treasurer etc of local branches)	13
Full Time officials	4
Shop Stewards	2
Safety Reps	1
Research	2
Union not position specified	2
Unspecified	1
	25

4. Experience:

(d) **Do you have any legal experience?**

	No of Arbitrators
YES	16
NO	56
	Total: 72

Breakdown of 'Yes' Responses:

Legal Experience	No of Arbitrators
Bar	5
Industrial Tribunals	4
Lecturer in Law	1
General - EOC HMI Police Officer Public Prosecutor Judges Registrar Public Corporation	6
	16

4. Experience:

(e) **Have you ever been employed by ACAS or the Department of Employment in a full-time capacity?**

	No of Arbitrators
YES	16
NO	56
	Total: 72

Breakdown of 'Yes' Responses:

	No of Arbitrators
Min of Labour, Dept of Emplt or ACAS	13
HMI	1
Economic Adviser (1 year)	1
Unspecified	1
	16

Breakdown of M/L, D/E, ACAS Responses:

	No of Arbitrators
M/L, D/E and ACAS	6
M/L only	3
D/E and ACAS	1
D/E only	2
ACAS only	1
	13

4. Experience

(f) Have you been in HM Forces?

	No of Arbitrators
YES	50
NO	22
	Total: 72

Breakdown of 'Yes' Responses:

Service	No of Arbitrators
Air Force	12
Army	11
Navy	6
Unspecified	21
	50

Type	
Wartime	18(1 x 7 yrs: 1 x 6 yrs: 4 x 5 yrs: 1 x 4 yrs)
National Service	12(2 x 3 yrs: 1 x 2 yrs)
Specific Position and/or years	14
Unspecified	6
	50

(-) No of years service where quoted

4. Experience:

(g) **Have you had other relevant industrial experience, for example, consultancy work?**

	No of Arbitrators
YES	58
NO	14
	Total: 72

Breakdown of 'Yes' Responses:

	No of Arbitrators	
Consultancy (Unions, Companies and Government Departments)	26	
Advisers	8	
Teaching	6	
CIR	5	
NBPI		4
Work Study	2	
Research	2	
Training	2	
Wages Council	2	
Industrial Tribunal		2
Industrial Court	1	
NEDC		1
CBI Council	1	
Donovan Commission	1	
Other	8	
Unspecified	3	
	74*	

* Totals 74 as 1 Arbitrator had experience in 4 areas; 1 Arbitrator in 3 areas and 11 Arbitrators in 2 areas

5. Occupation:

(a) **Are you currently in employment or have you retired?**

	No of Arbitrators
YES	48
RETIRED	24(3 part-time work)
	Total: 72

(b) **If you are in employment, please give a brief description of the post held:**

Post	No of Arbitrators
Professor	12
Head of Department	8
Senior/Principal Lecturer/Tutor	20
Lecturer	5
Self Employed	3
Other	3
	51 *

* Totals 51 as 3 Arbitrators are Professors and Heads of Department

Notes:

1. 4 Industrial Relations
   1 IR and Management Science
   1 Labour Law
   1 English Law
   1 Applied Economics
   1 Bus Admin
   3 Unspecified
   12

2. 1 Legal Dept
   1 Industrial Relations
   1 IR and Management Science
   1 Management Science
   1 School of Man Sc
   1 Deputy Head of Business School
   1 Economics
   1 Unspecified
   8

3. 5 Industrial Relations
   1 IR and Labour Economics
   3 Economics
   4 Law
   1 Law and Social Psychology
   2 Business Studies
   1 Political Economy
   3 Unspecified
  20

4. 2 Industrial Relations
   1 Economics and IR
   1 Economics
   1 Management and Administration
   5

5. 1 Barrister
   1 Journalist
   1 Consultant
   3

6. 1 University Principal
   1 Fellow in Industrial Relations
   1 Academic - unspecified
   3

5. Occupation:

(c) **What was your employment at time of becoming an ACAS Arbitrator?**

Type of Employment	No of Arbitrators
Professor	13
Senior/Principal Lecturer	16
Senior Tutor	1
Lecturer	20
Staff Tutor	2
Vice Chancellor	1
Manager	1
Head of Department	4 (1 Deputy Head)
Barrister	1
Retired	13
	Total: 72

5. Occupation:

(d) **Please list previous posts held:**

Previous posts were grouped under the following headings: Manual; White/collar; Managerial; Academic; Civil Service; Legal; and Trade Union.

	No of Arbitrators
Managerial and Academic	15
Civil Service	14
Academic	8
Academic and Legal	6
White-Collar and Academic	5
White-Collar, Managerial and Academic	4
Academic and Trade Union	3
Manual and Academic	3
Manual, Managerial and Academic	3
Manual, Academic and Trade Union	2
Managerial and Trade Union	2
Legal	2
White-Collar, Academic and Civil Service	1
White-Collar and Civil Service	1
White-Collar, Academic and Trade Union	1
Academic and Civil Service	1
Manual, White-Collar and Academic	1
Total:	72

The posts can also be broken down as follows:

	Manual	W/Collar	Managerial	Academic	C S	Legal	T U
Arbitrators	9	13	24	53	17	8	8

6. Recruitment:

How were you recruited as an Arbitrator for ACAS?

a) Did ACAS approach you?
b) Did you contact ACAS with a view to offering your services?
c) Were you encouraged to approach ACAS by a third party?
d) If other than the above, please specify.

Categories	No of Arbitrators
1 A only	45
2 B only	8
3 C only	6
4 D only	5
5 A and B	1
6 A and C	2
7 A, B and C	1
8 B and C	4
	Total: 72

Notes:

1. "Informally" - 1
"On recommendation from 2 persons" - 1
"Following D/E and Wages Council work" - 2
"From Ministry of Labour" - 2
"From Department of Employment" - 2
"Knew 3 other Arbitrators who may have indicated my interest" - 1

2. No additional comments

3. "ACAS official" - 1
"TU Gen Sec and D/E official" - 1
"My Professor" - 1

4. "Combination of A and B during an informal meeting" - 1
"Ministry of Labour" - 1
"Follow on Ministry of Labour and Department of Employment" - 1
"My Head of Department contacted ACAS" - 1
"At IR Seminar, ACAS official invited applications" - 1

5. "Informal discussion with ACAS officials" - 1

6. "Colleague on Arbitration list"

7. "Because close liaison with ACAS" - 1

8. "Other Arbitrator" - 1
"Other Mediator" - 1
"CIR Official" - 1

(B) ARBITRATION

7. **How long have you acted as an Arbitrator for ACAS?**

No of Years	No of Arbitrators
* 10 +	18
10	8
9	11
8	5
7	6
6	2
5	1
4	7
3	2
2	6
1	1
Less than 1	4
'New'	1
	Total: 72

* As ACAS has only been in existence for 10 years, those quoting more than 10 years must have worked for the D/E and/or the Min of Labour.

NOTE: SAMPLE NOW REDUCED TO 70

8. **In addition to working for ACAS, have you acted as an Arbitrator for any of the following:**

   a) CAC?
   b) Institute of Arbitrators?
   c) Privately?

Categories	No of Arbitrators
A only	2
B only	-
C only	40
A and C	13
B and C	2
None	13
	Total: 70

9. Single Arbitration:

(a) **Approximately how many ACAS voluntary Arbitration cases have you dealt with as a Single Arbitrator?**

No of Arbitrations	No of Arbitrators
100 +	2
90 +	1
80 +	1
70	-
60	3
50	7
40	4
30	5
20	14
10	12
1 - 10	15
Many	1
Not Many	1
'With Nellie'	2
None	1
Don't know	1
	Total: 70

(b) **Have you been assisted by Assessors in any cases you have dealt with?**

	No of Arbitrators
YES	46
NO	24
	Total: 70

9. Single Arbitration:

(c) **What did you find to be the advantages of their service?**

Comments	No of Arbitrators
None	1
Their first hand knowledge of the industry. Technical knowledge, eg on Work Study, Industrial Relations procedure in a particular industry and relevant precedents.	30
More general comments on their experience, information they provided and support, eg at the hearing - may ask questions which ensure both sides' case is clarified and put effectively; may reassure parties and thus make the Award more acceptable. After the hearing - act as a sounding board for Arbitrator's ideas; may report on attitudes of sides which did not come out at the Hearing; general consultation and their opinions after the Hearing.	15
	Total: 46 *

* Total 46 - see (b) above

Note:

1. A typical answer to this question was:

   "Their first hand knowledge in the industry, eg one of the options for the Arbitrator is to award re-employment but in some different area of work. Before using this option the Arbitrator needs first hand knowledge that there exists suitable alternative jobs.

2. A comprehensive answer to this question was:

   " i) I began the hearing a little more informed as to the general system between the parties by having a preliminary discussion with the Assessors;
   ii) Similarly I was able to get from them after the hearing minor points of information which had not come out during the hearing but which subsequently appeared relevant;
   iii) In 2 cases it was helpful to find the extent to which the Assessors had formed similar judgements."

9. Single Arbitration

(d) **What did you find to be the Disadvantages of their service?**

Comments	No of Arbitrators
None	16
None if their function is properly defined and understood	3
The main disadvantage cited was that Assessors exceeded their role and often were not always objective, acting as an advocate of the parties. This was thought to be particularly so of the TU representatives. 1	12
Other general comments were as follows: At the hearing - they can make proceedings more formal; take longer; or influence statements at the hearing by the parties because of their status within the organisation. In the discussion with the Arbitrator after the hearing there was a tendency to repeat the arguments of the hearing or to disagree with each other.	3
Increase the time taken in the whole process	3
They were superfluous	2
Quality sometimes low	1
	Total: 46 *

* Total 46 - see (b) above

Notes:

1. Examples of the answer to this question are:

"They are often strongly biased towards only one of the parties and often tend to regard their role more as that of an advocate of the party which they traditionally might be expected to support."

"Trade Union Assessors do have difficulty in making objective assessment. Employer Assessors are rather more able to be objective."

10. Board of Arbitration:

(a) **Approximately how many ACAS voluntary Arbitration cases have you dealt with as Chairman of a Board of Arbitration?**

No of Boards of Arbitration	No of Arbitrators
1 - 9	20
10 - 19	7
20	4
30	1
100	1
Don't know	2
None	35
	Total: 70

10. Board of Arbitration:

(b) **What did you find to be the advantages of having side members on the Board?**

Comments	No of Arbitrators
Their specific expertise and insights into problems	14
The opportunity to exchange views with others - 3 minds better than one	10
Similar to advantages of Assessors - Technical and background knowledge	6
The responsibility is shared	3
Fuller appraisal of merits of the case	3
Help the decision-making process	3
The Parties more likely to accept the Award if there is consensus	3
Can ask more penetrating questions than is expected of the Arbitrator	2
Make process more acceptable to the Parties	1
Depends on the Side Members and how free they feel not to sympathise or identify strongly with either side	1
Only moral support	1
Very few or no real advantages	3
	Total: 51 *

* Totals 51 as some Arbitrators quoted more than one advantage - The number of Arbitrators was 35 see (a) above.

A comprehensive answer to the Question was:

"Reduces the possibility of missing important clues in both written and oral presentations. With their respective management and TU backgrounds, side members may provide insights into a problem that might not occur to an independent. After the hearing a discussion among three people may be better than the internal discussion of an Arbitrator."

10. Board of Arbitration:

(c) **What did you find to be the disadvantages of having side members on the Board?**

Comments	No of Arbitrators
May prolong proceedings	8
Partisanship	7
Problem of reaching full agreement	7
Quality sometimes low	2
One may be more cooperative than the other	2
Increase formality of the process	1
Having to reach an agreement on the same day	1
Bias towards splitting down the middle	1
On one occasion, one was abrasive which made it difficult to present a united approach to the Parties	1
None or no significant disadvantage	7
No response	2
	Total: 39

* Totals 39 as some Arbitrators quoted more than one advantage - The number of Arbitrators was 35 - see (a) above.

A comprehensive answer to the Question was:

"The main disadvantage occurs if the representative of union or employer simply acts as advocates of the cause of their respective side and are not willing to act in any kind of conciliatory capacity; at worst they transmit to the Board the same kind of deadlock as already exists; they also prolong the proceedings sometimes leading to postponements, adjournments etc."

11. Single or Board of Arbitration:

(a) **Have you observed any distinction between the type of cases going to Single Arbitration and the type going to a Board?**

	No of Arbitrators
YES	21
NO	43
No response	6
	Total: 70

Breakdown of 'Yes' Responses:

Comment	No of Arbitrators
More important national disputes (often over pay) and affecting public sector go to a Board	5
Large, politically sensitive issues go to a Board	3
Depends on the wishes of the parties	3
Single Arbitration is limited to individual cases or small groups of workers	3
More complex issues to a Board	2
Issues concerning a large number of people go to a Board	2
Custom and practice in the industry or procedure agreement determines choice	2
ACAS influences choice	1
Large organisations go to a Board	1
Single Arbitration unless there are special features, eg complexity or importance	1
Boards for collective issues, frequently pay; Single for individual cases	1
Issues with wider scope and repercussions to Board	1
Board for NJIC agreements	1
Boards where several unions are involved	1
	Total: 27 *

* Totals 27 as some Arbitrators mentioned more than one distinction.

6 of the Arbitrators answering 'No' to this question also commented as follows:

"Depends on scale, 'importance' of the case."

"Where parties insisted on a Board."

"More than one issue likely to go to the Board."

"Tendency for agreements to refer to a Board."

"Dependent upon the Parties attitude and 'trust'."

"Number of cases where Board seemed expensive way of dealing with the dispute - tendency to use it if it is there."

11. Single or Board of Arbitration:

(b) **Should there be criteria for choosing Single Arbitration rather than a Board?**

	No of Arbitrators
YES	30
NO	24
Don't know	7
No response	9
	Total: 70

Breakdown of 'Yes' Responses:

Comments	No of Arbitrators
More complex, perhaps politically sensitive, collective issues to Board	7
The wishes of the parties	5
Board for cases requiring specialised or expert knowledge	4
More straightforward cases to Single	3
Cases of wider scope and possible repercussions to Board	3
Boards too expensive for trivial cases	1
Board when one side or other is likely to dispute the outcome	1
Single for cases where parties are deadlocked	1
Board where large sums of money are involved (more than £10,000)	1
Experience of the Arbitrator available	1
Where parties require the objectivity which the broad representation of interested bodies on the Board provides	1
Where more 'authority' is required, a Board should be used	1

Contd.

Board for cases infringing government regulations, eg incomes policy	1
Boards almost always more perferable	1
Rights cases to Single; Interest to Board	1
	Total: 32*

* Totals 32 as some Arbitrators mentioned more than one point.

Breakdown of 'No' Responses:

Comments	No of Arbitrators
The Parties should have the choice	19
ACAS should decide	1
Not possible to devise criteria	2
'Importance' is fallible guide, flexible approach is best	1
No further comment	1
	Total: 24

Note:

1. A typical answer to this Question was:

   "Should be left to the parties who have to live with the outcome to have unfettered choice of mode of arbitration"

12. Agreements:

(a) **Have you ever been asked to interpret substantive agreements?**

	No of Arbitrators
YES	50
NO	18
No response	2
	Total: 70

(b) **If yes, did you encounter any particular problems in interpretation? Please explain your answer**

	No of Arbitrators
YES	32
NO	12
Rarely	1
	Total: 55 *

* Totals 55 as some Arbitrators mentioned more than one problem.

Breakdown of 'Yes' responses:

Comments	No of Arbitrators
Agreements often vague and contradictory	9
Loose drafting which is fairly common	6
Over the intentions of the parties at the time of writing the agreement	6
Over custom and practice	3
Trying to define ambiguous terms, such as 'productivity', 'average bonus', 'relativities', 'equitable' and 'efficiency'	3
Stretching the agreement to fit new, changing circumstances	3
Whether to apply legal concepts to agreements which are not legally binding	1
Between national and local agreements	1
	Total: 32

Notes: Examples of the above answers are:

1. "Of course, agreements are multi-dimensional, frequently obscure and even contradictory"

2. "Have taken the line that only the parties who drew up the agreement in the first place can give an authoritative interpretation"

12. Agreements:

(c) **In your experience, were the agreements themselves in need of revision?**

	No of Arbitrators
YES	26
NO	3
Frequently	8
Sometimes	9
It varied	1
Most deliberately vague, therefore, not out of date	1
Need qualification rather than revision	1
No response	1
Total: 50 *	

* Total 50 - those that answered 'Yes' to (a) above

Breakdown of 'Yes' responses:

Most Arbitrators did not elaborate on their answer. Of the 8 who did the main points made were that some agreements needed revision in the light of changing circumstances, ie they should be brought up-to-date and should be clearer and 'simpler'.

13. Written Statements of the Parties:

(a) **Did you always receive written statements from both parties?**

	No of Arbitrators
YES	51
NO	9
Almost always	9
Yes, except on one occasion only received one statement	1
	Total: 70

(b) **Did you find these to be satisfactory in most cases?**

	No of Arbitrators
1 YES	49
2 NO	7
3 Generally	12
50/50	1
Helpful rather than satisfactory	1
	Total: 70

Notes:

1. Of the Arbitrators who answered 'Yes' to this question, 3 were satisfied in 'most cases' and 8 stated that the TU statements tended to be less satisfactory.

2. Of the Arbitrators who answered 'No' to this question, 1 specifically mentioned that the TU statements were unsatisfactory.

3. Of the Arbitrators who answered 'Generally' to this question, 5 were less satisfied with the TU statements.

13. Written Statements of the Parties:

(c) **If not, did this inhibit the Arbitration and award making process?**

	No of Arbitrators
YES	1
NO	32
To some extent	3
No response	34 *
	Total: 70

* Large number did not respond to this question as they had answered 'Yes' to (b) above.

Notes:

1. Of the Arbitrators who answered 'No' to this question, 9 mentioned that it just made the process take longer; and 2 emphasised that the hearing itself is crucial and where deficiencies in the statements can be overcome.

   Example answers were:

   "No, except it took longer. It took me some time questioning in some depth to ascertain what the issues were."

   "No, since the oral hearing is crucial."

14. Terms of Reference:

(a) **Are you satisfied with the quality of the terms of reference presented?**

	No of Arbitrators
YES	42
NO	3
Generally/Almost Always	15
Not always	8
75% of the time	1
No response	1
	Total: 70

(b) **To what extent have you felt restricted by the terms of reference?**

	No of Arbitrators
Always	3
Intended/preferable to be restricted	12
At times	19
Almost never	12
Not at all	15
Not restricted but sometimes difficult to identify issue	1
This is a matter for the parties	1
N/A	2
No response	5
	Total: 70

Notes: Example answers are:

1. "Always - but that is a good thing. With wider terms of reference one would go roaming into all sorts of dangerous issues many of which cannot be even diagnosed (less solved) in a quick hearing."

2. "Obviously restrained - but surely that is the intention, and quite right too."

3. "At times I have felt I was dealing with a limited visible problem when the real cause was not mentioned."

4. "I have only rarely felt restricted."

5. "Not to any extent."

14. Terms of Reference:

(c) **If you have felt restricted, how, if at all, did you overcome this?**

Comments	No of Arbitrators
Always kept within terms of reference - should be restricted	15
Clarified them with the parties	14
Making comments distinct from the Award	6
Only one occasion, when I stopped the Arbitration and with the consent of both parties, proceeded to Mediate	1
Transmitted intentions privately via ACAS and/or through Assessors	1
By expressing views and not awarding	1
Refuse to arbitrate for these parties again	1
N/A	6
No response	25
	Total: 70

Notes: Example answers are:

1. "I don't. I have always regarded the terms of reference as strictly binding."

   "Why do you need to overcome an intended restriction?"

2. "Usually at the beginning of any Arbitration I take the terms of reference for granted or only formally check them with the parties. If, however, they appear in some ways to be incorrect or odd I try to clarify this from the beginning. If during the course of the Arbitration it appears that they do not express what the case is really about I decide whether it is profitable to ask them whether they should be changed or not."

3. "Sometimes through general comments. Kept entirely distinct from the Award."

15. Award:

There is an implied criticism that Arbitrators always seek to 'split the difference':

(a) **What is your understanding of the term 'split the difference'?**

	No of Arbitrators
Half-way or middle position between claim and offer	28
50/50	5
Compromise	9
Something to each side	12
Somewhere between one party's offer and the other party's claim	2
Others	5
Comments	7
Don't know	2
	Total: 70

Notes: Typical answers are:

1. "Some people mean half-way between last claim and last offer."

   "The mid-point between offer and claim."

   (6 Arbitrators specifically mentioned half way or mid point between the parties' final/last offers or claims)

2. "Finding a 50/50 position between the parties."

   "50/50 split".

3. "To find a compromise position between last positions of the parties".

   "Compromising in rather 'wet' fashion 'in the middle'."

   (2 Arbitrators specifically mentioned the middle or half way compromise, the others were less specific)

4. "An award which gives something to each side, but which does not necessarily divide the difference equally."

   "To seek to make an award that gives some measure of success to each side."

5. "There are 2 different types of case which lends itself to the black or white and it is not possible to 'split the difference'. In other cases the parties are looking for a way around their difficulty, and finding a balance, not necessarily 'in the middle' which will satisfy the parties, is in my view a prime aim of the Arbitrator."

"The term implies the possibility of a range of choice being available which therefore requires very careful qualitative assessment. The judgement of Solomon usually satisfies neither party."

"This really has no meaning for me - I am looking for a workable and acceptable solution to a problem."

"To apportion costs/benefits equally."

"The usual one."

6. "I refuse to recognise this."

3 Arbitrators mentioned the cases to which it would apply but gave no definition - eg pay issues.

3 Arbitrators attacked the question and notion of 'implied criticism'.

15. Award:

(b) **How often have you felt under pressure to 'split the difference' or reach some kind of compromise?**

	No of Arbitrators
Yes	9
Frequently/Often	7
Occasionally	6
Very rarely	14
Not pressure	5
No/Never	18
Comments	7
No response	4
	Total: 70

Notes:

1. 3 Arbitrators mentioned compromise only.

2. 1 Arbitrator said compromise frequently, split the difference never.

3. 3 Arbitrators cited the wishes of the parties, eg

"This depends on what the parties appear to want - most terms of reference do not, in my experience, provide an opportunity for splitting the difference except in the sense of saying kind words to the party that has come out on the wrong side. The terms of reference are the fundamental guide."

3 Arbitrators made general comments, eg

"Some issues lend themselves more easily to maximising satisfactions than others."

1 Arbitrator had only dealt with cases where this could not arise.

15. Award:

(c) **Do you prefer to make a straight choice in your judgement in favour of one side or the other?**

	No of Arbitrators
YES	10
NO	14
No preference - depends on the circumstances of the case	23
A matter for the parties, not the Arbitrator to decide	2
Only when parties require it	6
Occasionally	4
Central question is to make an acceptable award and resolve the dispute	5
Cannot give a simple answer - dangers in making a straight choice	4
No response	1
	Total: 70

Notes: Typical answers are:

1. "It all depends. You have to read the situation. One doesn't often split the difference. Usually you can't - most Arbitrations are not of that nature - eg discipline, job grading and agreement interpretations."

   "Depends on facts, circumstances - not preference."

15. Award:

(d) **Do you consider that there is wider scope for the use of straight choice, flip flop, pendulum Arbitration? If so, can you suggest areas where it would be appropriate?**

1	No of Arbitrators
Yes	22
Conditional Yes	6
No	15
Parties should be left to decide	4
Depends on particular circumstances of the case	4
More research needed in this area before a view can be formed	2
No decided views	2
Don't know	5
No response	7
Question unclear	3
	Total: 70

Notes:

1. Areas suggested:

Pay	10
Interpretation of Agreements	4
Grading	4
Discipline/Dismissal	3
Rights cases	2
Differentials	2
Where parties understand the process	2
Local Plant Procedures	1
Sex Discrimination	1
Equal Pay	1
Where parties go to Arb too frequently	1
Where parties want it	1
Where there is compulsory arbitration	1
Where employers reluctant to go to arb	1
Where there is a tendency to split the difference	1
Where industries costs are high	1
Where the parties have narrowed their difference to a minimum	1
	Total: 37 *

* Totals 37 as 15 Arbitrators gave two or more examples

16. Reasons

(a) **What do you consider to be the advantages of giving Reasons for your Award?**

	No of Arbitrators
Legitimises the Award, and makes it more acceptable to the parties	15
May help those affected to understand how the decision was arrived at	7
May point the parties towards a more constructive path in the future - educational function	8
More credibility to the Award	3
Parties know Arbitrator has thought about the issues involved	6
Forces you to think logically - problem solving approach	2
Better than being mysterious	2
Opportunity to show one's reasoning	2
Justice to the parties' efforts	1
Parties may think there are advantages	1
Enables Awards to be used as 'Case law' in the future	1
For one's own satisfaction	1
Depends on the circumstances of the case	7
No clear advantage	8
None	5
I prefer not to (or do not) give reasons	4
No response	2
	Total: 75 *

* Totals 75 as 5 Arbitrators gave more than one advantage.

16. Reasons:

(b) **What do you consider to be the disadvantages of giving Reasons for your Award?**

	No of Arbitrators
Can lead to new disputes about Reasons	23
Parties may disagree with them and the Award, especially the losing party	14
'Legal' implications, ie set precedents for the future; appeals	8
May 'offend' the losing party - loss of face	5
Exposure of ignorance or understanding of detail on the part of the Arbitrator	4
May prompt criticism from the parties and thus discredit the process of Arbitration itself	5
Cannot cover all the points or be set out in rational way	2
May be misunderstood	2
May not improve Industrial Relations	2
Often reasons are judgemental	1
Against the public interest	1
Weakens the Arbitration process	1
If Arbitrator is unsure of his grounds	1
Reasons open to contention	1
Accusations that all factors have not been considered	1
Undermines acceptance of the Award	1
Sidetracks reason for Arbitration and may prolong Hearing and terms of reference etc	1
Depends on the circumstances of the case	2
None	4
No response	1
	Total: 80 *

* Totals 80 as 7 Arbitrators gave more than one Disadvantage

16. Reasons:

(c) **Do you prefer the system of recording your 'Considerations' to giving Reasons for your Award?**

If so, why?

	No of Arbitrators
YES	40
NO	6
Depends on the circumstances of the case	4
Don't know	1
Prefer to give both	2
I do not sharply distinguish between the two procedures	6
Use Considerations, but do not necessarily prefer it - Reasons carry more weight	2
Even better to express as 'Findings'	1
Prefer Reasons or Recommendations	1
Do not understand the Question	1
No Response	6
	Total: 70

Breakdown of 'Yes' Responses:

Falls short of Reasons, but allows some explanation of what influenced the Arbitrator	12
Reasons implied but not explicit	3
Parties see that their arguments have been taken into account	3
Some indication of the Arbitrator's thinking	2
Prevents arguments and involving other issues	2
'Safer' than Reasons	2
Gives some background to the Award without having to justify it	2
Indication without detailed reasoning	2

Contd.

Summary of the submissions	2
Likely to cause less damage	1
Useful to widen the area of interest to cover the state of Industrial Relations within the concern	1
Can help acceptance of the Award, but never give Reasons	1
Need careful drafting but can have persuasive function	1
Clarifies scope and nature of the Award	1
Weighing up evidence and submitting it clearly?	1
Avoids argument while showing that the Arbitrator has not forgotten or ignored important evidence	1
Allows aspects to be written in logical way	1
One can choose what one says - improving Industrial Relations is the objective	1
Can indicate that one has thought through the issue; direct attention to issue requiring attention; help Managers and Shop Stewards get acceptance of the Award	1
	Total: 40

16. Reasons:

(d) **Alternatively, do you prefer to make no comment and just give your Award?**

If so, why?

	No of Arbitrators
NO	33
YES	9
Depends on the circumstances of the case	12
N/A	2
No response	14
	Total: 70

Breakdown of 'No' Responses:

14 Arbitrators added comments as follows:

Parties should be satisfied that Arbitrator has paid some attention to the arguments	5
Leaves the impression that Arbitrator does not have a clue	1
It is important to demonstrate through the Report that the Arbitrator has understood all the arguments	1
Too brusque, arbitrary	1
Parties prefer some explanation	1
Parties entitled to get some reaction to at least their main arguments	1
Allows Arbitrator to play God, which is a bad thing	1
Comments provide continuity with terms of reference and submissions	1
Rarely justified - implies arrogance or fear that his views might be faulty	1
But there is merit in the legal dictum that you should always give your verdict but never your Reasons	1
	Total: 14

Breakdown of 'Yes' Responses:

6 Arbitrators added comments as follows:

This is most practical method	1
In cases where feelings run deep, and one party has to accept an Award they do not like	1
Settles dispute without further conflict of views	1
Prevents arguments	1
Sometimes there is nothing to add	1
If this is what the parties want	1
	Total: 6

1. A comprehensive response to this question was:

"Depends on the case. Parties do not want to read the lot, but do want to feel that they have had value for money. Quite often in Arbitrations it is self-evident that the parties just want the question decided. One has to assess when it is helpful to give reasoning and when it may be counter-productive."

17. Recommendations:

(a) **Do you consider it is part of the Arbitrator's duties to make Recommendations?**

	No of Arbitrators
YES (with comments)	21
YES (no comments)	8
NO (with comments)	10
NO (no comments)	12
Depends on the circumstances, issues of the case	6
Sometimes	3
Not usually	3
If Parties wish it	2
Not a question of duty	2
Yes and No - I think it is a good idea but it is discouraged by ACAS	1
You cannot give an absolute answer to this	1
Don't know	1
	Total: 70

1. Breakdown of 'Yes' Responses:

Occasionally	8
In appropriate circumstances/cases	5
Only if both parties want it	4
But with considerable care	1
If Arbitrator identifies a basic weakness in the Industrial Relations practice or procedure which contributed to the dispute	1
Only where helpful to the parties, and does not bring Award into question	1
Where relevant and provided Arbitrator knows what he is doing	1
	Total: 21

2. Breakdown of 'No' Responses:

Not unless asked by the parties	5
Should not, save exceptionally	2
Not usually	1
Arbitrator's duty is to settle the difference according to the terms of reference	1
Arbitrator's job is to decide; a Mediator recommends	1
	Total: 10

17. Recommendations:

(b) **What do you consider to be the advantages of giving Recommendations?**

	No of Arbitrators
Helps parties - Assistance in future Industrial Relations	21
When one finds problems, eg with out of date procedures	10
If parties wish it, there must be advantages	6
In some cases gives a losing side something from the Arbitration	3
To cover points which might arise at the Hearing outside the terms of reference	2
Can prevent recurring problem	1
Deeper dispute can be diagnosed	1
Allows relevant comment which is not part of the terms of reference or Award	1
Educational function	1
Can show that Arbitrator understands the difficulties encountered by the parties	1
It saves face - the Arbitrator can be blamed	1
Ameliorate unwelcome aspects of the Award	1
Avoid a repeat of the dispute	1
Outsider may see points which the parties should attend to	1
Can be constructive, but ...	1
Other comments (not advantageous)	8
None	2
No response	7
	Total: 70

17. Recommendations:

(c) **What do you consider to be the disadvantages of giving Recommendations?**

	No of Arbitrators
Insufficient knowledge to give advice - could be contentious	8
Parties resent it - may have repercussions for future IR	8
Necessary to stick to the terms of reference - parties could object if you do not	6
Could invite hostility to the Award	4
Not part of the Arbitration procedure	4
Inadequate knowledge - hostility of parties	3
Could leave greater problem than existed before Arbitration - parties have to live with the Award	3
Recommendations are for Mediation - Arbitration is to determine a problem	3
Danger of opening up the issue again	3
Parties may disagree about their status	3
Particularly resented by losing side	3
May be counter productive	2
May appear naive and ill-informed	2
Not likely to be accepted - interference	1
Might increase the giving of gratuitous advice	1
Not necessary and parties do not usually want them	1
Recommendations are best left to proper diagnostic service and in-depth investigations	1
Appear too intrusive and offensive to losing party	1
Interfering in 'domestic' situation	1

Contd.

They can seem to carry more weight than they should	1
Unacceptable to one party	1
Where parties are over sensitive about their IR practice	1
Depends on the Recommendations	1
None	2
No response	7
	Total: 73: *

* Totals 73 as 3 Arbitrators gave more than one answer

18. Outcome:

(a) **Would you like to be informed as to how your Award was received by the parties?**

	No of Arbitrators
YES (no comments)	29
YES (with comments)	12
NO (no comments)	13
NO (with comments)	12
Occasionally	1
Don't know	3
	Total: 70

1. Breakdown of 'Yes' Responses:

Out of curiosity/personal interest	3
Would help in future cases	2
Some time later when dust has settled	2
In some cases	1
With reservations - may not be practicable or may endanger relationship with the parties	2
Would like to know if parties were satisfied with handling of the case	1
Do not like silence and remarks made on future occasions	1
	Total: 12

2. Breakdown of 'No' Responses:

Likely to hear anyway if there have been problems	3
May well raise grievance of a party or cause future problems	2
May influence subsequent decisions	1
Would put additional strain on the parties if they knew their views would be communicated to the Arbitrator	1
Despite curiosity	2
It is impractical	1
Unless it was received badly	1
Except some feedback in my first few Arbitrations	1
	Total: 12

18. Outcome:

(b) **Have you any ideas on how this could best be done to ensure reliable feedback?**

	No of Arbitrators
Comments - with ideas	34
Comments - against feedback	11
No/None	9
No response	16
	Total: 70

1. Breakdown of Ideas:

Through ACAS staff/officials (no further comment on how this should be done) *	17
Through ACAS **	6
Form/Questionnaire issued with Award	7
Ask ACAS personnel how this should be done	2
Informal way (not specific)	1
In some cases, through Joint Secretaries of NJCs	1
	Total: 34

* 5 Arbitrators mentioned the Conciliation Officer who dealt with the case.

** 3 Arbitrators said any comments/reactions given to ACAS should be passed on to the Arbitrator; 2 Arbitrators said through gentle, informal enquiry of the parties; and one felt it would be useful for ACAS to monitor trends and disclose these to the Arbitrators.

*** Through Questionnaire, Pro-forma or just asking the parties to give their reaction/comments. Two Arbitrators felt that this should be done almost straight after the Award is issued, and again in six months time.

2. Breakdown of Comments Against Feedback

Present system is adequate	1
Agree with ACAS's existing practice, but there is a need for some overall evaluation of the process which could perhaps be done in discussions between ACAS/CBI/TUC	1
Costly and perhaps not worth setting up the necessary machinery	2
Encourages prolongation of the argument	1
Would give rise to future difficulties	2
Every case is different, therefore do not know what could be learned from this	1
Not necessary as regular meetings of Arbitrators already provides useful feedback	1
If parties knew they could convey their feelings to the Arbitrator this may affect the independence of the Arbitrators	1
Feedback does not matter - if good, only increases Arbitrator's ego	1
	Total: 11

(C) CURRENT ISSUES

19. Procedure Agreements:

(a) **Have you dealt with cases where the parties' voluntary agreement has a clause which permits reference to Arbitration?**

	No of Arbitrators
YES	65
NO	4
No response	1
	Total: 70

Procedure Agreements:

(b) **If yes, did you find the agreements appropriate to current circumstances?**

	No of Arbitrators
YES*	44
Usually	6
Not always	4
Varies from case to case	1
Some need updating	1
Often the dispute arose because it was not	1
Don't understand the question	5
No response	8
	Total: 70

* Of the 44 Arbitrators that answered 'Yes', 7 made further comments:

3 said yes with reservations.

1 said in most cases.

1 felt that at times the agreements were rather cumbersome

1 said yes, even if the parties themselves took a different view, and

1 said he would like to see more use made of the USA distinction of 'rights' and 'interests'.

19. Procedure Agreements:

(c) **What do you consider to be the advantages of writing-in Arbitration and/or the use of ACAS itself into Procedure Agreements?**

	No of Arbitrators
Avoids necessity to take industrial action	15
Further stage in the procedure which may avoid dispute	12
Useful safety valve and 'let out' for the parties or officials	8
More certainty in situation	7
Provides for settlement of difference by peaceful means	3
Provides an independent and impartial view	4
Avoids further dispute about whether or not to seek ACAS help, or who Arbitrator should be	2
May encourage parties to make greater effort to solve problems jointly without the help of a third party	1
Encourage parties to use Arbitration (ie opposite view to the above)	2
Focuses attention on the possibility of using ACAS	1
Ready made machinery in the event of a dispute	1
Other comments *	8
No views on this	1
Don't know	1
No response	4
	Total: 70

* Further comments were made by 8 Arbitrators, ie did not give 'advantages'

2 said that this was a question for the parties themselves

2 felt that Conciliation should be written in, but not Arbitration

1 argued that reference to Arbitration should be mandatory, but specific reference to ACAS should be voluntary in order to preserve faith in its impartiality

1 said it would depend on whether it was an option or mandatory

1 said it was more appropriate in the post 1974 period when ACAS was building up its reputation and case load

1 did not think it mattered

Notes: Typical answers were as follows:

1. "It should avoid the necessity to take industrial action."

   "Clearly an alternative to industrial action."

2. "Obvious further stage."

   "It provides another stage for the possible peaceful resolution of the dispute."

3. "Providing ACAS can remain independent it is a useful safety valve - particularly for an individual."

   "It provides an escape route, whereas when the 'heat' is on, one party or the other is pressurised into refusing independent Arbitration."

4. "Both sides can be clear where the case ends up - promotes order and ensures the parties tread carefully on the way."

   "This introduces more certainty/clarity into the situation."

19. Procedure Agreements:

(d) **What do you consider to be the Disadvantages of writing-in Arbitration and/or the use of ACAS itself into Procedure Agreements?**

	No of Arbitrators
May encourage parties not to settle in negotiations or maintain unreasonable attitudes/position	16
Easy way out - decreases the urgency and resolution of own disputes/problems	8
Abdication of responsibility	5
Parties may not want, or require it	3
May cause more problems than it solves	3
May be occasions when parties do not want to be restricted by standing commitment to Arbitration	1
Sometimes parties would have settled earlier, but feel they should go through the whole procedure arrangements	3
Narcotic effect - too automatic	3
No disadvantage in ACAS, but compulsory Arbitration may shorten negotiations	1
Rejection of the Award if it is automatic, and one party is opposed	1
This is a question for the parties themselves	1
None *	16
Don't know	2
No firm views on this	1
No response	6
	Total: 70

Notes: Typical answers were:

1. "'Chilling effect' on negotiations."

   "In several cases I have noticed that negotiations at the earlier stages were perfunctory, so that Arbitration was becoming a substitute for negotiation."

   (While 4 of the Arbitrators cited this as a disadvantage they added that this had not been their experience.)

2. "I have taken cases where I felt that the parties should certainly have been able to sort out the problem without resort to Arbitration. In other words, Arbitration can be an easy way out."

   "Can lead management and unions to shy away from taking uncomfortable decisions."

3. "Can lead to the parties abdicating their responsibilities in reaching their own solutions."

* Of those Arbitrators who answered 'None', 6 made further comments:

1 said there may be theoretical disadvantages, but he had not found any

5 had reservations -

unless automatic which harms collective bargaining

if it is the last resort

except that the matter may have been examined many times before it reaches ACAS

provided that it is recognised that Arbitration is in reality only penultimate stage

provided Conciliation is written in before Arbitration.

19. Procedure Agreements:

(e) **Do you have views about the use of Arbitration in the public sector, and in particular 'essential services'? (For example, the use of standing bodies of Arbitration.)**

	No of Arbitrators
Comments in favour	34
Comments against	6
General comments	12
No - no comments	9
No strong views	2
Can't answer briefly	1
No response	6
	Total: 70

Notes:

1. In general the Arbitrators felt that there had to be some way of resolving or preventing lengthy and costly disputes in the public sector and protecting the taxpayer and consumer. The Arbitrators did note that there were difficulties over the interpretation of 'essential services' and the possible 'interference' by Government, eg where pursuing a particular economic policy or formal/informal incomes policy.

Examples of the comments made are:

"Yes - I do believe that Arbitration must have a greater role in the public sector with the increasing militancy of public sector unions. But it is not 'magic'. In particular I have doubts about the use of Arbitration to settle pay questions in view of possible conflict with a Government's economic policy. If the Arbitrator ignores government policy he is 'independent' but 'irresponsible'. If he gives effect to that policy he is seen as a government 'poodle'."

"Yes - the public sector is in a different position to private sector because the only source of finance is the taxpayer, ie HM Government. Standing bodies can keep a check on industrial relations issues which need not always be financial ones."

"Yes - but it needs to be mutually accepted by the parties, as a principle, and not seen as an expedient. Also standing bodies of Arbitration would need to be seen as not subject to over-riding Government intervention which undermines their independence."

2. The main comments against the use of standing bodies were that they may lose freshness of approach to problems; they may overstay their welcome; and could cause erosion of negotiation. Two Arbitrators were particularly against the use of compulsory standing bodies.

3. General comments were made over the difficulty of defining what is an 'essential service'; the possible cost of the use of standing bodies, especially if unions accept 'no strike' clauses; and the desirability of leaving parties to solve their own problems wherever possible on a voluntary basis.

20. Voluntary or Compulsory Arbitration:

(a) **What are the advantages of voluntary Arbitration?**

	No of Arbitrators
Acceptance of the outcome	30
In keeping with British system of Industrial Relations	4
Mutual consent of parties	4
Additional stage in bargaining process	3
Peaceful way of resolving dispute	2
Speedy way of resolving dispute	2
No enforcement problems	2
Increases understanding between parties	2
Others *	9
Cannot answer briefly	4
No response	8
	Total: 70

* Other general comments were made, eg:

"It can get parties off the hook."

"I think there are well rehearsed arguments about this matter."

"This question raises major issues of political values, eg the role of unions and collective bargaining in society, etc."

"It depends what you mean by 'compulsory Arbitration'."

20. Voluntary or Compulsory Arbitration:

(b) **What are the disadvantages of voluntary Arbitration?**

	No of Arbitrators
None	16
Few, but can lead to manipulation	4
Delay	3
Impasse if one party refuses to go	5
One party may be unwilling	4
Might not be accepted by one party	4
Overuse	3
Not used enough	2
May prevent use of Arbitration	2
Others *	16
Cannot answer this briefly	4
No response	7
	Total: 70

* Other general comments were made eg:

"Parties resent 'extreme' decisions."

"Third Party interests cannot be represented."

"Usefulness recognised by those least in need."

"Very few as long as parties don't get addicted to it."

"Can lead to unresolved issues."

"Demands on the Arbitrator."

"Puts issue into the hands of someone who does not have to live with the Award."

"It does little or nothing to redress any fundamental inequality of bargaining power."

"May discourage parties from negotiating."

"There are well rehearsed arguments on this."

"Depends on definition of terms."

"It is always a second-best solution - an imposed solution is always likely to be inferior to one jointly arrived at."

"Obvious!"

20. Voluntary or Compulsory Arbitration:

(c) **What are the advantages of compulsory Arbitration?**

	No of Arbitrators
None	5
Comments that there are few or no advantages	11
Comments stating advantages	31
Depends on the circumstances	3
Need fuller definition of 'compulsory arbitration' before answering	5
Cannot answer this briefly	1
Others	2
Don't know	5
No response	10
Total:	73 *

* Totals 73 as 3 Arbitrators gave more than one advantage

Notes:

1. Examples of comments were:

"Few - short-term cure only."

"Could not be used for long."

"Not acceptable to both parties in the UK industrial relations system."

"Unworkable."

2. Breakdown of Advantages:

Possible avoidance of industrial action	12
Certainty and getting an answer	4
Speed	3
More extensive use of Arbitration	2
Orderly system	1
Gives issue an airing	1
Neat and authoritative	1

Contd.

Both sides can be heard	1
Concentrates the mind	1
Parties may settle without going to Arbitration	1
Last resort	1
Norms of behaviour of advantage to both sides	1
Makes parties narrow the gap	1
Useful in essential services, disputes cases, interpretation	1
	Total: 31

3. Other comments were:

"Well rehearsed answers here."

"Almost a contradiction in terms."

20. Voluntary or Compulsory Arbitration:

(d) **What are the disadvantages of compulsory Arbitration?**

	No of Arbitrators
Resentment and unacceptable to parties	21
Impairs negotiations and removes responsibility from parties	8
Cannot be made compulsory or imposed	8
Can become discredited and thus the whole system of Arbitration	4
Makes Arbitration more coercive and short-lived	3
Can be manipulated and create sense of uncertainty	1
Bureaucratic procedures	1
Inflationary	1
Symptoms would be treated, but not necessary real problem	1
Liable to be political misuse	1
May harm future industrial relations	1
Too much power in hands of a third party	1
Forcing someone too quickly	1
Depends on the circumstances	1
Don't know	1
Cannot answer this question, without a definition	6
Others	3
No response	7
	Total: 70

20. Voluntary or Compulsory Arbitration:

(e) **What do you consider to be the relative merits of joint and unilateral access to Arbitration?**

	No of Arbitrators
Comments on joint access	31
Comments on unilateral access	28
Cannot answer this question without definitions	5
Both should be allowed	2
No views on this	3
Don't know	2
Others	2
No response	6
Total:	79 *

* Totals 79 as, after 9 Arbitrators commented on both joint and unilateral access

Notes:

1. Breakdown of joint access responses:

Joint is preferable	11
Arbitration needs agreement of both parties	5
Better chance of getting Award that sticks	3
Fewer problems provided you agree terms of reference	1
In favour of joint for reasons implicit in above replies to Voluntary and Compulsory Arbitration	6
Acceptance of the Award	2
Flexibility	1
Joint responsibility	1
Less reluctance to go to Arbitration	1
Total:	31

2. Breakdown of unilateral access responses:

Against for reasons implicit in above replies to Voluntary and Compulsory Arbitration	7
Unworkable	2
Unenforceable	1
Unacceptable	1
Undue pressure put on either party	2
Award may be rejected	2
One party may be reluctant and resent it	2
May enourage frivolous applications	1
Inflationary	1
Less satisfactory than joint	1
May frustrate negotiations	1
Less likely to produce lasting settlement	1(ie 22 'Against')
Weaker party has opportunity to force stronger one to Arbitration	3
May force a decision	1
For recognised terms and conditions	1
Only for interpretation issues	1(ie 6 'For')
	Total: 28

21. ACAS:

(a) **Could ACAS do more than it presently does in the form of Bulletins, Induction Training and Seminars to enhance industrial relations Arbitration?**

	No of Arbitrators
YES	27
NO	32
Possibly	3
Don't know	6
No response	2
	Total: 70

Notes:

1. 13 of the 'Yes' Arbitrators commented as follows:

"Very limited indeed."

"Regular meetings with a sound working Agenda."

"I think so but it costs money and requires resources."

"But with care."

"One can always do more in this imperfect world. But it does depend on funds and staffing. At present I am sure ACAS does what it can."

"But it is doubtful whether it would be of great value."

"More publicity should be given to Arbitration - many industrialists do not realise the advantages of proceeding through ACAS."

"There should be residential seminars for Arbitrators (like for JPs)."

"Through the publication of selective studies conducted by individuals on Arbitration, more frequent seminars, and the encouragement of a resource network amongst Arbitrators."

"More training at start." *

"Short induction sessions with list of recommended reading and possible role playing."

"But ACAS needs first to sort out its own attitude to the value of Arbitration."

"Certainly on the Bulletins and Seminars. There are problems about in-house training."

* This comment was made by one of ACAS's 'old' Arbitrators, who is perhaps unaware of ACAS's current practice.

2. 10 of the 'No' Arbitrators commented as follows:

"Not sure if anything."

"I am satisfied with the contacts made and seminars to keep us in touch."

"Improvement in recent years."

"Probably about right for the present, though more development might be appropriate in future."

"What it does is just about right."

"The introduction of bulletins and conferences has made welcome provision, previously lacking."

"The present arrangements are adequate. If it did it could be counter-productive - compromise the independence of Arbitrators. They don't want to be known as 'Men from the Ministry'."

"I'm pleased with what ACAS does."

"I doubt it very much. I have little faith in exhortations - think change will come about only through the actual experience of the parties."

3. 2 of the Arbitrators who answered 'Possibly' commented as follows:

"Depends on extent to which ACAS uses Arbitrators' existing expertise. If likely to be called upon to go beyond this, further instruction might be helpful."

"ACAS essentially controlled by its own 'terms of reference'. I find its service to Arbitrators good - possibly the parties could be helped by further local contacts but this involves staff time and present cuts 'limit any possible extension'."

21. ACAS

(b) **If yes, can you suggest ways? (For example, would you favour obtaining professional qualifications or becoming a member of an Institute?)**

	No of Arbitrators
Comments	30
No	11
Possibly	2
Don't know	1
No response	26
	Total: 70

Notes:

1. Varied comments as follows:

"Professional qualifications do not by themselves indicate an individual is analytical or capable of an honest and fair judgement. They imply he has reached a level of knowledge of a subject. More seminars devoted to case studies could be extremely useful - confidentiality would be a problem."

"I would strongly oppose Arbitration becoming a 'professional' matter as it is, for example, in the United States."

"To deal with the examples: I feel that ACAS (As the parties themselves in the case of private arbitration) should have the greatest possible freedom of choice over Arbitrators, and wouldn't want them to be restricted to members of a certain institute or people with certain qualifications. The present arrangements - where ACAS recruits people for its panel and proposes Arbitrators to disputants seems to me to work well enough. Only if the reputation of ACAS were to fall might an institute be worth considering; at present, it might be an unnecessary competitor for ACAS and a harmful distraction for parties in dispute."

"I would not favour obtaining professional qualifications or becoming a member of an institute (it is desirable of course that the person appointed is already in possession of a professional qualification) - perhaps an induction course of about 1 week would be desirable (given by an experienced competent Arbitrator)."

"No advantage in professional qualifications, but more seminars would be very welcome, including analysis of particular cases after the event."

"The Chartered Institute of Arbitration MIGHT help but commercial Arbitration is an entirely different matter from industrial relations."

"As in the USA?"

"Yes - if confined to employment arbitration."

You are really on your own and should remain that way."

"I do not favour attaching professional labels or institution membership which tend to feed the ambitious. Totally confidential discussion groups, as already held are helpful. The problem is how to get experienced Arbitrators into a position of revealing how they have handled recent cases and the problems that arose. This helps newly appointed Arbitrators. There is also a case for those who have handled highly pressurised national cases to be willing to talk fully to other Seminar Arbitrators about the case, its development, conduct, award and outcome."

"NB I think ACAS could do more, but I don't think it should. I think what it does is helpful."

"More frequent and more intensive discussions among Arbitrators (and ACAS). Not favour professional qualifications or Institute."

"Yes - I think Arbitrators should present a professional image to industry. From my experience too little is known about Arbitration."

"Yes - through the publication of selective studies conducted by individuals on Arbitration, more fequent seminars, and the encouragement of a resource network amongst Arbitrators."

"I am not sure about professional qualifications. I may be prejudiced because of my own background, but I do not think there is any substitute for all-round industrial relations experience. It would not be practicable for ACAS to circulate every report and award to every Arbitrator, but perhaps selected awards might be circulated because of their special interest or even as 'models'. What about Regional Seminars on Arbitration for TU officials?"

"Greater use of Boards or Assessors. Publicity in press/paid weekends for Arbitrators and industrial colleagues to meet and share experiences. Institute membership."

"Period of 'apprenticeship' - 3 cases at least."

"Most Arbitrators are already exceptionally well qualified in a variety of specialist fields respectively. In the majority of cases they will also be skilled in the principles and practice of negotiations and human relations; have a sound knowledge of legislation and of systems of reward and recompense for work done."

"How do you assess experience/maturity/understanding etc and other qualities which make for good Arbitration? I doubt whether holding a 'Certificate' would make me a better Arbitrator."

"It seems impossible to provide examinations for Arbitrators but there is value in better public relations. Possibly an Institute would assist this process. Whether such a step is taken or not it is essential that the experience of the best industrial relations Arbitrators should be conveyed to beginners. Although much of the secret of success is a knack there are good and bad attitudes which can be the subject of instruction. There are also pitfalls to be avoided and signs to look for. The main trouble is that the best Arbitrators appear to work by instinct and have not thought deeply

about what it is they are doing. Perhaps a start could be made by use of the device common in Industrial Tribunals and the CAC of a series of introductory sittings with experienced Arbitrators."

"ACAS do well and would give help if asked."

"Possibly more interchange between Arbitrators through seminars/meetings, and interchange with ACAS officials. It might be useful to have an Institute of Arbitrators, where Arbitrators themselves could operate professionally and be less 'anonymous' and their professional standing made clear (that they are not unaware of the 'facts of life')."

"Would favour some form of body - not an institute - but more on lines of National Academy of Arbitrators - US style."

"I suppose training is always a good thing but nous and experience seem to be prime requisites."

"Induction training."

"Yes, but needs a lot of thought."

"Slightly more formalisation of induction training."

"Arbitrators are essentially slightly loner minds - if too much training, individuality may be quashed. Make clients more suspicious."

"Yes." (no further comment)

"Certainly not either of these examples. The more ad hoc, ephemeral, and unorganised the Arbitrators are, the better for voluntary IR."

2. 5 Arbitrators said 'No' and made no further comments. The other 6 commented as follows:

"No - commercial Arbitration is very different from IR Arbitration."

"No - more small regional and inter-regional meetings of Arbitrators for Arbitrators not for benefit of HO. Preferably chaired by Regional Directors."

"No - can arrange 'case conferences' where Arbitrators could discuss different approaches."

"No - professionalism would or might lead to quasi-legal approach."

"No, No. The last thing you want is a professionalisation of the service. The great merit is that it draws from a pool of very diverse characters, with differing experiences. The Arbitrator is an individual."

"No. But more exchange of information about cases could be very instructive."

Full details of the answers have been quoted for ACAS's purposes.

21. ACAS

(c) **Can the process be taken too far?**

	No of Arbitrators
Comments	34
Yes	8
No	2
Possibly	5
Don't know	1
Question unclear	3
No response	17
	Total: 70

Notes.

1. The following comments were made:

"That danger exists."

"Imagine so."

"Which process? Arbitration? Yes - some cases involve trivial amounts. Promoting Industrial Arbitration? Yes - if it were pushed to the point where ACAS made a nuisance of themselves."

"Yes. The strength of ACAS Arbitrator is that he is <u>not</u> a professional and has no powers."

"Yes it can. ACAS do at present run an annual seminar, that is good, and with the addition of an induction course that is all that should be necessary. The important consideration is that the Arbitrator has a proven track record in IR. An academic discipline is desirable to provide a logical problem solving approach and to help in presenting a clear reasoned report."

"I suppose so."

"We are certainly not at risk yet in that respect. Note also the possiblity of short reports by Arbitrators to ACAS, to improve the annual statistics."

"Yes. The best qualification is IR experience."

"Yes indeed. Success (if that is the right word) depends largely on common sense and sympathetic objectivity."

"Far too far."

What process? That of 'enhancing' Arbitration? Yes, I think so. If the Arbitrators are well-chosen and not kept on for ever that would be better than constant buffing-up."

"Yes - particularly if it is publicised or becomes a bandwagon for the inexperienced."

"Yes - I'd be against over-formalisation and form of credentialism as a condition of Arbitrators being appointed."

"Yes - in the sense that the greater effort/expense is likely to be disproportionate to the benefit."

"Evidence for current methods is the success over many years. Confidence of the parties in the Arbitrator and the system is essential. Perhaps some parties, especially some unions would not welcome an Arbitrator of a 'specialised' kind."

"Only if it is badly run. ACAS would have to ensure that the process weeded out the prejudiced and inadequate Arbitrators."

"Yes, if development becomes too institutionalised at the expense of self development."

"I think it can. I think ACAS must continue to rely on people who are 'ready made' to act as Arbitrators, and give them the kind of support and training as at present provided."

"Not if it reflects views of trade unions/management on its professionalism."

"Generally a letter briefly from ACAS seems to be a good idea. If the parties, however, came to believe that ACAS is too far involved they are likely to lose confidence in the Arbitrator as having been instructed from above."

"Yes, but ACAS present performance is very good on the whole."

"Yes. Arbitrators are usually men and women to whom time is a very valuable commodity. Any extended training could prove repetitious especially to experts, well practised, in the art of digesting reports and case histories. The sheer breadth of human activity involved could make the preparation of curriculum a daunting task and the mere completion of a specified course of study may still not produce the ideal Arbitrator for every case."

"Yes, in theory. I should not wish to see IR Arbitration become a profession - though, that said, more needs to be made known and understood about the Arbitration process (contrast the situation in the USA)."

"Yes, an Arbitrator does operate by instict guided by experience. Constant reference to taught principles could be damaging."

"Not sure what this question means. Obviously a sense of perspective must prevail. But to date, I think the image of ACAS Arbitrators could do with enhancement to indicate that they are persons of high professional standing, etc."

"Yes - ACAS is, and should be, judged by its works."

"Yes - should not imply formal and rigid rules, or set case law."

"Yes - a long lasting solution is for the parties."

"Yes: I am against the further professionalisation of the subject."

"Limit to training - experience real training."

"Very easily."

"Yes, there is a limit to the number of issues that Arbitration raises and can be discussed, eg in seminars. In training there is a point at which the novice must go it alone."

"Difficulty of finding a balance - give new Arbitrators some sort of idea how to do the job, but in such a way that they are still independent."

"Yes - implication for independence and acceptance of the Arbitration."

Full details of the answers have been quoted for ACAS's purposes.

22. Conciliation:

Are you satisfied with the current arrangements for preserving the integrity of Arbitration and the separate integrity of Conciliation? Please explain your answer.

	No of Arbitrators
Yes	57
NO	5
Don't know	3
Comments	3
No response	2
	Total: 70

Notes:

1. 9 Arbitrators did not explain their answer. The remaining 48 Arbitrators made comments, examples of which are as follows:

"At the moment there is no connection at all between Conciliation and Arbitration. I think this is the way it should be."

"Broadly correct. Arbitrators are expendable. Conciliation must continue to be seen as independent."

"It does seem to me to be important that the parties are satisfied that they will get an impartial (as well as independent) hearing (and consideration generally) of their difference; and this means excluding the possibility of the Arbitrator becoming prejudiced through previous discussion with a Conciliation Officer."

"In my experience, Conciliators have been scrupulous in not allowing influence on Arbitrators."

"I do prefer to be able to say to the parties that I am entirely dependent on them for my knowledge of the case."

"ACAS Conciliation Officers have a reputation for impartiality. That should be preserved. Keeping the Conciliation process and Arbitration separate assists in this respect. If, in the present system, an Arbitrator is controversial then blame can be attached to the Arbitrator, or the particular context. Confidence in the system can be maintained by keeping the two processes separate."

"I believe it is essential for the Arbitrator to enter the field 'cold', ie without prior knowledge of the comings and goings which took place during the Conciliation process."

"Conciliation will never work if it is known that things said, or possibilities hinted at, will subsequently come to the knowledge of a final Arbitrator."

7 of the Arbitrators who made comments also stated that in exceptional cases or special circumstances, some contact between the Conciliator and Arbitrator can be helpful.

2. Comments were made by 5 Arbitrators as follows:

"I have not encountered any indicators that it is unsatisfactory though this is not to say that there are no unsatisfactory manifestations."

"I am unaware of any such arrangements. But remarkably few people seem to be aware of the true difference between Conciliation and Arbitration and ACAS has not shaken off the image it acquired in its early days, under the Chairmanship of Jim Mortimer, now General Secretary of the Labour Party."

"I think that the Arbitrator should have powers (with agreement of the parties) occasionally to convert Arbitration into Mediation or Concilition."

"The CAC does not preserve separate integrity. It constantly has in mind the possibility of agreed settlement. On the CAC, I have sometimes suggested to the parties a solution. This is, indeed, common on information issues where the preliminary hearing is partly for this purpose. Disciplinary Arbitrations probably could not incorporate this possibility but I think it would be possible for the parties to indicate whether they were prepared to accept Conciliation."

"Would prefer more contact with Conciliators on particular cases."

3. 3 Arbitrators did not directly answer Yes or No, but made the following comments:

"I am not convinced of the wisdom of keeping them separate. At times an experienced Arbitrator might be an effective Conciliator."

"I have deliberately fudged it on occasions - you can't be too rigid. (They will probably fire me for this confession!)"

"They are not separate."

23. General:

Please make any other general comments that you would wish to make on the present and/or future role of Arbitration and the Arbitrator. (For example, on the introduction of legally binding arrangements for Awards.)

	No of Arbitrators
Comments	46
No further comments	3
No response	21
	Total: 70

Notes:

1. 35 of the Arbitrators who made comments were against legally binding arrangements. Some examples of their comments are as follows:

"Don't believe that legally binding awards, any more than legally binding agreements, can solve industrial relations problems. The constructive improvement of industrial relations can only be achieved by voluntarily building procedures which acquire credibility and acceptance."

"If the law is to be amended to allow legally binding arrangements, will this not also lead to an appeals procedure against the legal enforcement? If parties go to Arbitration, they are committed to acceptance of the decision. If they do not want or fear the result of Arbitration, they just do not go unless it is built into their procedure. In this last case the parties are morally bound to accept the decision."

"Attacks on Arbitration in recent years have been unfortunate. The role of Arbitration should be extended in the interests of 'good' industrial relations and in avoiding costly disputes for the parties and indeed the general public. The attacks have been made on a flimsy basis and opportunities should be taken to refute them. Given the record of observance of awards, I see no advantage in having legally binding awards."

"I hope I have said enough in my previous answers to convey my belief in the essentially voluntary nature of the Arbitration process. The only obligation on the parties to accept awards is a moral one, but it is a fact that over the many years that voluntary Arbitration has been available very few awards have been rejected. In my view that is the strength and the ultimate test of the system."

"Unless there is an outstanding case for increased legislation why add more? The more legislation the less freedom and the greater will be the expertise required to interpret it. Heaven forbid that we become a nation of lawyers or that the legal profession should grow to become the greatest service industry."

"If industrial relations are good, law is unnecessary. If they are bad, laws make them worse."

"Legally binding agreements through Arbitration or otherwise are no more than a joke in industrial relations. Persuasion is essential. Compulsion will not work. It never has. Examples of the failure of the law abound."

"The quicker way to make our Arbitration system useless and unwanted and unused, would be to give it greater formality and (heaven forbid) make the awards legally binding."

"On the whole, I think ACAS has got it right and has had it right from the start. ACAS is an independent service which offers to help parties in difficulties in a variety of ways. Arbitration is just one of those services, available if the parties want it. Such things as legally binding agreements are not for ACAS or the Arbitrator to impose. If the parties want it to be legally binding it can be made so, but not otherwise."

The remaining 11 Arbitrators made general comments or made reference to articles they had written on the subject. Examples of their comments are as follows:

"A great deal more needs to be understood about Arbitration. When more work has been done it may be possible to ensure a better general quality of Arbitrator. The introduction of tripartite Arbitration would, I believe, greatly advance the reliability of Arbitration. But only then is it feasible to think of legally binding Arbitration."

"I do not share the fashionable view that legally binding agreements are wholly undesirable. On the other hand I do not advocate total legalism. I suspect this and future governments will experiment much more with legalism; they may have a role in connection with certain public sector bargaining units in return for no strikes or even (following GCHQ) no unions."

"Arbitration could have a more important role if its advantages become better known to industry. I think that the existing ACAS panel should merge with the CAC and that there should be no division between the function of the CAC and the Arbitrator or Mediator."

"I think that Arbitrators could be usefully used more in local disputes (as was envisaged when the CAC was first set up)."

"I think ACAS handles its Arbitration responsibilities very well. It may be embarrassed by having too many Arbitrators for the work arising at present, but I do not think it would be advantageous to industry or the unions to move away from present concepts of roles and responsibilities.

"I do not think one should get too excited about prospects for change in the nature of Arbitration or the extent of its use. The experience of the parties and the facts of economic life matter much more than external advice from any source."

(D) MEDIATION

24. **Have you ever acted as Mediator?**

	No of Arbitrators
YES	32
NO	38
	Total: 70

Those Arbitrators who answered 'Yes' were asked to complete questions 25-28. However, 5 of the other Arbitrators made comments or answered questions 26-28.

25. **Mediation: Approximately how many cases have you conducted?**

	No of Mediators
20-30 cases	2
10-20 cases	3
2-10 cases	18
1 case	7
Don't know	2
	Total: 32

26. **Mediation: Which particular issues, if any, do you consider are better dealt with by Mediation rather than by Arbitration?**

	No of Mediators
Issues	18
Not issue but circumstances	8
Where parties want recommendation not award	5
Where parties unwilling to commit themselves to fixed terms of ref	3
None	1
Don't know	1
No response	1
	Total: 37 *

* Totals 37 as this includes 5 replies from those Arbitrators who have not acted as Mediators.

Notes:

1. Of the 18 Mediators who cited issues, the most quoted was complex cases where a compromise decision rather than a one side or the other is appropriate. Other issues mentioned were:

   Those of a more political nature.

   Those which require problem solving approach.

   Highly charged and antagonistic issues.

   Interest cases.

   Where Mediation is written into procedure agreements.

   Conditions at the workplace.

   Basic principles such as TU recognition, inter-union issues.

   Where there is rationalisation and reorganisation and an independent examination is required.

   Where some research work is required.

   Where decisions may have signification commercial impact for a company.

2. 8 Mediators specifically emphasised that it was not necessarily a question of issues but more the attitude of the parties involved or deadlock situation which they may have reached. Examples of such replies are:

"I think it is the attitudes of the parties which are important rather than the issues. Some parties (particularly TUs) might be willing to accept Mediation but not Arbitration."

"Situations rather than issues perhaps, eg with the wish of the parties to remove a deadlock in negotiations."

3. Related to (2) above, 5 Mediators emphasised the situation where parties want Recommendations but want to reserve the right to make their own decision, ie where, when Conciliation has failed, they will accept Mediation as a useful option if they are unprepared to accept Arbitration. Examples of such replies are:

"Where Conciliation has failed and Arbitration is unacceptable."

"It is only if Arbitration is rejected or is inappropriate for some reasons, that the Conciliator will turn to Mediation in the hope that a formal recommendation might gain enough acceptance."

"Mediation is a useful option ACAS can put to parties who are reluctant to commit themselves to the decision of an Arbitration."

4. A further 3 Mediators, believed Mediation was appropriate where the parties may be unwilling to commit themselves to fixed terms of reference, eg

"Where the parties find difficulty in agreeing terms of reference to resolve their problem. There is an urgent need to resolve the problem."

27. **Mediation: Are you satisfied with the distinctions between Mediation and Arbitration which are currently in practice?**

	No of Mediators
Yes	30
Other comments	6
Don't know	1
	Total: 37 *

* Totals 37 as this includes 5 replies from those Arbitrators who have not acted as Mediators

Notes:

1. 30 Mediators answered Yes to this question, 25 did not elaborate but 5 added the following comments:

   "Most seem to understand it, or can appreciate an explanation."

   "Both have distinct roles to play. Mediation is not as widely known as its usefulness would justify. Mediation was little used prior to ACAS."

   "Reasonably."

   "Although I find that any Industrial Relations and Personnel Officers are not sufficiently well informed. Companies are not always ready to recognise the need for outside help, especially when budgetary constraints are looming large in their thinking."

   "But I am by no means sure they are widely understood. Terminology in industrial relations is not as widely understood as it ought to be."

2. Other comments were made as follows:

   "The Arbitrator acts as judge and jury in matters put before him. The Mediator merely recommends. The Conciliator does neither, his is the role of Chairman without even a casting vote."

   "Again the distinction is sometimes too rigidly applied."

   "I don't think they are well understood in industry at large."

   "It seems to work quite well, With the consent of the parties it would sometimes be nice if Arbitration could continue from Mediation at the same hearing. In practice this does sometimes happen. Though very rarely."

   "No. Some procedure agreements use the word Arbitration when Mediation is meant. ACAS could do more to publicise the difference."

   "It would be wrong to pretend that they must be distinct."

28. **Mediation: Are there any special methods you introduce to Mediation which you do not use for Arbitration?**

	No of Mediators
Yes - parties can be seen separately more like Conciliation	20
Yes - other comments	7
No	4
No response	6
	Total: 37 *

* Totals 37 as this includes 5 replies from those Arbitrators who have not acted as Mediators.

Notes:

1. 20 of the Mediators noted that Mediation allowed them to see the parties separately with one hearing room and two side rooms; it allowed greater opportunity for informal discussion; also to offer ideas and suggestions for a solution, ie more like Conciliation process. Examples of such answers are:

   "In Mediation I may have separate discussions with each party as a Conciliator would do, where I can probe narrow differences and test ideas. I have found, in Mediation cases, that parties are more ready to change views and attitudes than in Arbitration. Probably because they are not bound by the recommendations even though they normally accept them. I am also conscious that even although they may not accept the recommendations they may use them for further useful negotiations."

   "As in Conciliation one might at times talk to the parties separately."

   "See parties separately and jointly, explore range of possible solutions, fuller reports."

   "Separating the parties and talking as a supportive friend to each group which opens them up and indicates area of compromise which they would otherwise decline to indicate."

2. While not mentioning Conciliation or separate meetings specifically, the other 7 Mediators comments as follows:

   "Generally much more informal, with parties constituted as a committee with independent Chairman. Goodwill tends to be high at first but falls away after about 3 months, so if much work is needed, it tends to be very intensive."

   "A later start in order that there will be an adjournment for lunch. And attempt to formulate a proposal to put to the parties at the hearing in order to focus their ideas."

"The problem first required an overview before the investigative procedure is introduced. The procedure to be adopted needs to be fully understood and agreed with the parties concerned. Without this, there is unlikely to be any acceptance of the ultimate recommendation. In an Arbitration local issues are paramount. Mediation often needs to take account of broader issues which may be of a regional or national character."

"Not specifically but it would depend upon the individual case."

"Yes. One is more persuasive in advancing a possible resolution."

"They are quite different - Mediation is much more open-ended and time consuming."

"Of course dishonesty is the obvious one."

ALICE BROWN
MARCH, 1985

APPENDIX II

SURVEY OF ARBITRATION AND MEDIATION PROCEDURES

Summary of Arbitration Awards 1942-1985 (incl)

and

Summary of Dismissal and Discipline Cases 1974-1985 (incl)

Arbitration and Mediation

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Alice Brown

September 1986

SUMMARY OF ARBITRATION AWARDS 1942-1985

As part of the Survey of Arbitration and Mediation Procedures in Britain, a survey of Arbitration Awards for the period 1942-85 was undertaken. A one in ten random sample of ad hoc arbitration cases was chosen (Single and Boards of Arbitration) excluding the awards of the standing bodies of arbitration such as the Industrial Court and the CAC. As the awards studied are the property of the parties, the identity of the parties has not been disclosed.

A full report of the survey has been prepared for the use of ACAS. This summary of the results was prepared for the 1986 Arbitration Seminars together with summaries of the schedule of awards.

The objectives of the survey were:

To identify the main users of arbitration;

To assess the extent to which Arbitrators have been constrained when making their awards, ie whether in the terms of reference they have been asked to make a straight choice between the offer and the claim, or whether they have been free to exercise their judgement;

To determine whether or not Arbitrators have stayed within their terms of reference;

To examine the types of issues coming to arbitration and the extent to which these have altered over the period;

To ascertain whether or not Arbitrators have given Reasons for their awards;

To analyse the outcome of the awards themselves; and

To evaluate the criticisms sometimes made of arbitration, that Arbitrators always split the difference or produce a shabby compromise, and make their awards without regard to the employer's ability to pay or current economic conditions.

Because of the particular interest in 'General Pay Issues' a separate schedule was compiled to deal with these cases. Further, as the operation of the Industrial Tribunal system is currently under examination, a separate breakdown of Dismissal and Discipline cases for the period 1974-1985 (under the auspices of ACAS) was also compiled.

The survey examined the Industries using arbitration; the Trade Union users; the Terms of Reference; the Issues coming to arbitration; Arbitrators' Remarks; and the Results of the Awards themselves.

1 Industry

The survey of the users of arbitration showed a split between the private and public sectors of industry as 82% in the private sector and 18% in the public sector, with an increasing use of arbitration by the public sector in the 1980s. Some sectors have moved in and out of the public sector over the years, and this has been taken into account.

In the full survey report prepared for ACAS attempts were also made to

identify the categories of industries using arbitration, although this was not always possible as the arbitration awards gave the name of the company but no information as to the type of operation. What is clear from the schedules, however, is that the industries using the arbitration service reflect the shift in employment patterns over the period (for example from manufacturing to service industries); and also the increasing militancy of certain groups (for example the car industry in the 1960s). The earlier cases are dominated by references from the textile, steel, engineering, transport, food and chemical industries, while more recent users included the education, banking, newspaper and television sectors. A major user of the service over the whole period was the food and drink industry - the alcoholic drink industry in particular being a source of many discipline cases.

2 Trade Union

Given the influence of Jack Jones in the setting up of ACAS and the size of the Transport and General Workers Union, it is perhaps not surprising to find that the TGWU is the major user of the service. However, it is clear from the cases examined, that the TGWU has always been a significant user of the state's arbitration machinery even before the existence of ACAS.

Over the period examined, 27% of cases involved the Transport and General Workers' Union (TGWU); 11% the Amalgamated Union of Engineering Workers (AUEW); 9% the General and Municipal Workers' Union (GMWU); 5% the Association of Scientific, Technical and Managerial Staff (ASTMS) and the Association of Professional, Executive, Clerical and Computer Staff (APEX); 4% the Electrical, Electronic, Telecommunications and Plumbing Union (EETPU); 3% the National Joint Industrial Council of the Electricity Supply

Industry (NJIC/ESI); 2% the Union of Shop, Distributive and Allied Workers (USDAW) and the Iron and Steel Trades Confederation (ISTC); and the National Union of Public Employees (NUPE), the National and Local Government Officers Association (NALGO) and the Society of Graphical and Allied Trades (SOGAT) each accounted for less than 1%. Of the remaining 31% of cases, a large number of unions were involved - from relatively well known unions such as the National Union of Seamen (NUS) to less well known such as the Scottish Horse and Motormen's Association (SHMA).

3 Terms of Reference

The Terms of Reference for the arbitrations were divided into four categories: - (i) Straight Choice (where the Arbitrator was asked to decide between the offer and the claim); (ii) Judgement (where the Arbitrator was allowed to reach a decision between the offer and the claim if s/he wished); (iii) Revoked, Confirmed or Varied (this applied to the NJIC/ESI Dismissal and Discipline cases only); and (iv) Split (where the Arbitrator was faced with two sets of terms of reference one from the employer and the other from the union).

For all types of cases covered and over the whole period the results were as follows:

Arbitration	Terms of Reference
53%	Straight Choice
41%	Judgement
3%	Revoked, Confirmed or Varied
2%	Split

For the earlier years, the category Straight Choice has been used when the Terms of Reference were of the nature - "To decide whether the following claim of the union should be conceded" or "To decide whether the claim of the union for 1s per week increase in wages is justified." In this sense, Straight Choice (final offer, pendulum or flip-flop) arbitration has always existed in British industrial relations. In addition, particular types of cases lend themselves to Straight Choice decisions eg Dismissal cases - "should an employee be dismissed or not" or Grading issues "should the grade for the job be A or B".

It should be noted that the earlier cases operated under Order 1305 from 1940 - 1951 and Order 1376 from 1951 until 1958. During this period there was unilateral access to arbitration, and most claims were initiated by the union. The choice faced by the Arbitrator, therefore, was to chose for or against the claim - as in most cases the employers did not concede that an increase should be granted.

However, this is not the earliest reference to Straight Choice arbitration I have discovered. In a paper written by Dr Treble of Hull University entitled 'How New Is Final Offer Arbitration', Dr Treble stated that final offer arbitration operated in the British Coal Industry Conciliation Boards at the turn of the century.

The Boards' Constitution provided, that in the event of no agreement being reached between the parties, an Arbitrator should be brought in to give the casting vote. This clause was, however, interpreted differently in different areas - for example, in Scotland Arbitrators exercised their judgement in reaching an award, while in the Federated Areas of South Wales, Durham and Northumberland the Arbitrators interpreted their task as deciding between the final offer or the final claim of the parties. With the

exception of South Wales, the final offer interpretation was changed after a number of years largely as a result of pressure from the Arbitrators themselves.

Treble quoted from a book by Stanley Jevons (1915) to identify the first claims of the so-called superiority of final offer arbitration - that is, it is more likely to result in reasonable demands; the offer and the claim are less likely to differ widely; much of the work is undertaken before the parties come to the Arbitrator; and one side is always satisfied. The debates over the advantages/disadvantages of final offer arbitration in the early 1900s are very similar to those being expressed in current literature. For example, many Arbitrators considered final offer arbitration to be inferior and that the important factor to be considered was the future harmony between the parties.

The findings of Treble are similar to my findings particularly with regard to the 1940s cases, where the Terms of Reference, although on a strict reading appeared to be Straight Choice, were interpreted differently by different Arbitrators. However, in some cases where although the Terms of Reference were of a Straight Choice nature and the outcome has been classified as 'Compromise', this was often because a number of issues were put to the Arbitrator simultaneously, and the Arbitrator found for or against the claims separately. The figures quoted for the outcome of the Awards can, therefore, be argued to understate the extent of Straight Choice outcomes.

4 Issues

(a) Rights or Interest

Of the issues coming to Arbitration, an attempt was made to divide them between the categories 'Rights' and 'Interest'. The definition outlined in John Lockyer's book on Arbitration has been adopted, ie an issue of Right involves the application of an agreement (interpretation of the past); and an issue of Interest involves the formulation of an agreement (decision for the future). However, the figures quoted should be used with some caution as some cases have elements of both Rights and Interest, and what might appear to be a straightforward Rights issue on the surface, could have implications for Interests in the future. Also it would be misleading to categorise particular types of issues, eg Grading, as always falling into the Rights category. The majority do fall into the Rights category, where the Arbitrator is asked to decide, by examining the current agreement, whether a job should be classified grade A or B; but in other cases the Arbitrator is asked to establish a new grading system, thus falling into the Interest category.

With the qualifications expressed above, the figures are:

70%	Rights
29%	Interest
1%	Mix (both Rights and Interest where the Arbitrator was asked first to interpret the current agreement, and secondly to settle a dispute over the drafting of a new agreement)

(b) Types

Over the period examined very similar issues were the subject of arbitration cases, although some were time specific, for example war bonuses in the 1940s and equal pay in the 1980s.

Pay and terms and conditions of employment accounted for 66% of the cases; Dismissal and Discipline for 18%; Grading for 12%. Other cases included Redundancy and Demarcation disputes, and other Trade Union matters.

Pay issues are the cases which receive most media attention. However, it would be misleading to conclude that the 66% pay and terms of conditions cases quoted above were all major pay issues. Many pay issues are not about annual pay claims, but are concerned with bonus payments and allowances, payment during strikes, holiday pay etc. However, what appears to be a relatively trivial issue on the surface may have implications for the future, or may be a symptom of other industrial relations problems at the place of work. It should also be noted that the arbitration awards can cover from one worker to thousands of workers.

5 Arbitrators' Remarks

Whether or not Arbitrators should give Reasons for their awards has been the subject of much debate in the past. From the awards examined, very few Arbitrators have actually given Reasons under such a heading - in only 0.4% of the cases. However, in 50% of cases the Arbitrators gave some form of reasoning - 20% in the report or with the award itself and the other 30% under such headings as General Considerations; Comments; or Conclusions. The adoption of the procedure of including reasoning under these headings

has increased since Arbitrators' Seminars were set up. In 40% of cases Arbitrators gave no reasoning for their awards, and especially in the earlier years where the reports themselves were often only a half or a quarter of a page in length. Again, in recent years the writing of reports has become more comprehensive and standardised.

Another area of debate in arbitration is whether or not Arbitrators should give Recommendations when making their awards. Recommendations were made in 10% of the cases. In the earlier cases Arbitrators were less inclined to make Recommendations, although the practice increased in the 1970s. In more recent years the tendency has been for Arbitrators not to give Recommendations unless required to do so by the parties.

6 Outcome of Arbitration

(a) All Cases

For all cases over the whole period the outcome of the awards was as follows:

Arbitrations	Outcome
30%	For Union
39%	For Employer
26%	Compromise
4%	Unquantifiable
1%	Varied

If these figures are compared to what the Arbitrators were actually asked to

do under the Terms of Reference (see section 3 above) the following results emerge. Fifty-three % of cases were of the Straight Choice type, but Arbitrators actually made a Straight Choice in 69% of cases. Forty-one % of cases allowed the Arbitrator to use his/her judgement and award between the claim and offer, although this was only exercised in 26% of cases, ie a compromise decision was possible in 41% of cases, but Arbitrators' compromised in 26% of cases only. Therefore, contrary to popular belief, Arbitrators do not always 'split the difference', although they do compromise when asked to do so by the parties involved. Further cases such as Grading and Dismissal issues do not often lend themselves to split decisions.

(b) Interest Cases (Pay and terms and conditions of employment)

It is in respect of annual pay claim cases where Arbitrators are most often criticised for 'splitting the difference'. In these cases, 31% were of a Straight Choice type and 67% allowed the Arbitrator to make a judgement. The outcome of these cases was as follows:

Arbitrations	Outcome
17%	For Union
24%	For Employer
55%	Compromise
4%	Unquantifiable

Therefore, in 41% of cases, the Arbitrators made a Straight Choice although were directly asked to do so in only 31% of cases. Thus, although Arbitrators could have compromised in 67% of the cases, they did so in only 55% of cases. Again, the evidence would suggest that Arbitrators do not

always 'split the difference' although they do compromise when asked to do so by the parties. Of the compromise decisions, there were very few examples of the 50/50 split type, ie where the award was exactly half-way between the claim and offer, and the majority of awards lay closer to the Employer's offer. Further, compromise decisions often related to very complicated and complex cases where pay and conditions had to be considered. These cases are less likely to fit into the Straight Choice category as the Arbitrator has to consider a number of issues within the overall package.

(c) Dismissal and Discipline

A separate schedule was prepared for Dismissal and Discipline cases conducted under the auspices of ACAS from 1974-1985 for Single and Boards of Arbitration and Mediation.

Sixty-seven % of cases were Dismissals and 33% were Discipline. Of these cases the outcome was as follows:

Arbitration	Outcome
42%	For Union
47%	For Employer
10%	Penalty Varied
1%	Cases withdrawn or unquantifiable

The outcome of the Dismissal cases only was as follows:

Arbitration	Outcome
50%	For Union*
49%	For Employer
1%	Cases withdrawn or unquantifiable

*In 51% of the cases found in favour of the Union, a reduced penalty was imposed, ie the employee was not dismissed but was disciplined. In the remainder of cases the employee was also judged to have been unfairly dismissed, but did not receive an alternative penalty. Whether or not the Arbitrator recommended reinstatement or re-employment depended on the terms of reference.

Dismissal and Discipline cases have formed an increasing proportion of the total Arbitration cases particularly from 1980. However, a large proportion of these cases are arranged for the NJIC/ESI. Since 1980 these cases have accounted for a large percentage of the total Dismissal and Discipline cases as follows:

Year	NJIC/ESI Arbitrations *
1980	30%
1981	41%
1982	61%
1983	51%
1984	57%
1985	67%

* Percentage of total number of Dismissal and Discipline cases.

Therefore, the proportion of Dismissal and Discipline cases would not have altered significantly over the period if these cases were excluded.

7 Conclusions

From the awards surveyed, it is possible to reach the following conclusions:

i) The main users of arbitration are in the private sector and reflect the shift in employment patterns over the period. The TGWU is the major trade union user.

ii) Straight Choice arbitration is not new in British industrial relations.

iii) Arbitrators do not always 'split the difference', especially if the split is considered to be a 50/50 position between the claim and offer. Arbitrators do, however, compromise when asked to do so by the parties and where a Straight Choice decision is not appropriate.

iv) Arbitrators do mainly stay within their Terms of Reference, although the interpretation of Terms of Reference will vary between Arbitrators, and this has always been the case.

v) Of the issues coming to arbitration, approximately two-thirds can be categorised as Rights and one-third as Interest cases. The issues most frequently referred were Pay and Conditions of Employment, Dismissal and Discipline, and Grading.

vi) Arbitrators seldom give Reasons for their awards, although there is an

increasing trend to include their reasoning under 'General Considerations' or other headings.

vii) The outcome of the awards varied depending on the type of issue and the terms of reference. With the exception of Dismissal and Discipline cases, a larger proportion of the awards were found in favour of the employer.

viii) Arbitrators are often criticised for making their decisions without regard to economic conditions and 'ability to pay'. In the awards, it was usual for Arbitrators to refer to such factors in pay issues when reaching their decision, although these were not the only considerations involved. Other factors were considered, such as the maintenance of good industrial relations in the future. This conclusion supports the results of the research by Towers and Wright, and also their general conclusion that British Abitrators respond to the particular needs of the parties concerned, and like the tailor the Arbitrator makes 'suits which are recognisably similar although skilfully tailored to meet the special requirements of each customer.'

Survey of Arbitration and Mediation Procedures

Summary of Arbitration Awards

1942-1985 (incl)

Alice Brown,
September 1986

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

[Sample of @ 1 in 10]

1, Industry

Year	Total No. of cases	Private	Public
1942	7	7	-
1943	10	10	-
1944	7	7	-
1945	5	5	-
1946	4	4	-
1947	3	3	-
1948	4	4	-
1949	6	5	1
1950	3	2	1
1951	5	5	-
1952	4	3	1
1953	4	3	1
1954	2	1	1
	64	59	5

Year	Total no. of cases	Private	Public
1955	2	2	-
1956	2	2	-
1957	2	2	-
1958	2	1	1
1959	3	2	1
1960	4	4	-
1961	3	2	1
1962	4	3	1
1963	5	5	-
1964	3	3	-
1965	6	4	2
1966	6	6	-
1967	3	2	1
1968	6	6	-
1969	5	5	-
1970	6	5	1
	126	113	13

Year	Total no. of cases	Private	Public
1971	6	4	2
1972	7	4	3
1973	6	6	-
1974	14	13	1
1975	30	26	4
1976	31	24	7
1977	31	25	6
1978	43	35	8
1979	38	33	5
1980	29	21	8
1981	25	22	3
1982	24	18	6
1983	21	14	7
1984	19	14	5
1985	17	12	5
	467	384	83
		(82.2%)	(17.8%)

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

[Sample of @ 1 in 10]

2. Trade Union

Year	Total No of Cases	TGWU (STGWU) (ACTSS)	AUEW (AEU) (TASS)	GMWU (NUGMW) (MATSA)	ASTMS	APEX	EETPU (ETU) (PTU)	ISTC	NJIC/ ESI	USDAW	NUPE	NALGO	SOGAT	Not named	Indiv	Oth
1942	7	2	1	1	-	-	-	1	-	-	-	-	-	-	-	3*
1943	10	1	2	2	-	-	-	1	-	-	-	-	-	-	-	7*
1944	7	1	-	2	-	-	-	1	-	-	-	-	-	-	-	3
1945	5	1	2	1	-	-	-	-	-	-	-	-	-	-	-	3*
1946	4	-	-	1	-	-	1	-	-	-	-	-	-	-	-	2
1947	3	-	1	-	-	-	-	1	-	-	-	-	-	-	-	1
1948	4	-	1	2	-	-	-	-	-	1	-	-	-	-	-	-
1949	6	4	-	-	-	-	-	-	-	1	-	-	-	-	-	5*
1950	3	1	1	-	-	-	-	-	-	-	-	-	-	-	1	-
1951	5	2	-	1	-	-	-	-	-	1	-	-	-	-	-	5*
1952	4	-	2	-	-	-	-	-	-	-	-	-	-	-	-	3*
1953	4	1	-	1	-	-	-	-	-	-	-	-	-	-	-	2
1954	2	1	-	-	-	-	-	-	-	-	-	-	-	-	-	1
	64	14	10	11	-	-	1	4	-	3	-	-	-	-	1	35

Year	Total No. of Cases	TGWU (STGWU) (ACTSS)	AUEW (AUE) (TASS)	GMWU (NUGMW) (MATSA)	ASTMS	APEX	EETPU (ETU) (PTU)	NJIC/ ESI	ISTC	USDAW	NUPE	NALGO	SOGAT	Not Named	Individual	Other
1955	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2
1956	2	-	1	-	-	-	2	-	1	-	-	-	-	-	-	2*
1957	2	1	-	-	-	-	-	-	-	-	-	-	-	-	-	1
1958	2	1	-	-	-	-	-	-	-	-	-	-	-	1	-	-
1959	3	1	-	-	-	-	-	-	-	1	-	-	-	-	-	2*
1960	4	1	-	1	-	-	1	-	-	-	-	-	-	-	-	2*
1961	3	-	-	1	-	-	-	-	-	-	-	-	-	-	-	2
1962	4	-	1	-	-	-	-	-	-	-	-	-	-	-	-	5*
1963	5	1	1	-	-	-	-	-	1	-	-	-	-	-	-	5*
1964	3	1	-	1	-	-	-	-	-	-	-	-	-	-	-	1
1965	6	1	-	-	-	-	-	-	-	-	-	-	-	-	-	5
1966	6	2	1	1	-	-	-	-	-	-	-	-	-	-	-	2
1967	3	-	1	-	-	-	1	-	-	-	-	-	-	-	-	2*
1968	6	2	-	2	-	-	-	-	-	-	-	-	-	-	-	2
1969	5	2	-	1	-	-	1	-	-	-	-	-	-	-	-	2*
1970	6	2	-	1	-	-	-	-	-	-	-	1	-	-	-	2
	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
	126	29	15	19	-	-	6	-	6	4	-	1	-	1	1	72

Year	Total No. of Cases	TGWU (STGWU) (ACTSS)	AUEW (AUE) (TASS)	GMWU (NUGMW) (MATSA)	ASTMS	APEX	EETPU (ETU) (PTU)	NJIC/ ESI	ISTC	USDAW	NUPE	NALGO	SOGAT	Not Named	Individual	Other
1971	6	3	1	-	-	-	1	-	-	-	-	-	-	-	-	1
1972	7	3	-	2	1	-	-	-	-	-	-	-	-	-	-	1
1973	6	3	-	1	2	-	-	-	-	-	-	-	-	-	-	-
1974	14	2	2	3	-	2	1	1	-	1	-	-	-	-	-	4*
1975	30	14	4	-	3	1	2	-	-	3	1	-	-	-	-	8*
1976	31	10	8	-	-	3	1	-	-	-	1	-	-	-	-	11*
1977	31	14	6	2	2	3	-	-	-	-	-	-	-	-	-	6*
1978	43	11	8	5	3	3	1	-	2	2	1	-	-	-	-	12*
1979	38	18	1	2	6	4	-	-	-	-	-	-	-	-	-	10*
1980	29	8	3	4	3	4	2	2	-	1	-	-	-	-	-	10*
1981	25	8	3	3	2	3	1	1	-	-	-	-	1	-	-	7*
1982	24	6	4	5	3	1	3	2	-	-	-	1	-	-	-	5*
1983	21	2	1	-	1	1	-	5	-	1	-	1	-	-	-	9
1984	19	8	2	-	-	1	1	2	1	-	-	1	-	-	-	6*
1985	17	5	1	-	-	-	1	2	-	-	-	-	2	-	-	6
	467 |537|[1]	144	59	46	26	26	20	15	9	12	3	4	3	1	1	168
		(26.8%)	(11%)	(8.6%)	(4.8%)	(4.8%)	(3.7%)	(2.8%)	(1.7%)	(2.2%)	(0.6%)	(0.7%)	(0.6%)	(0.2%)	(0.2%)	(31.3%)

* Cases where more than one Trade Union involved.

Notes:-

[1] Totals 537 when all TUs involved are included.

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

(Sample of @ 1 in 10)

3. Terms of Reference

Year	Total No. of Cases	Straight Choice	Judgement	Revoked Confirmed or Varied	Split t/r	n/a
1942	7	6	1	-	-	-
1943	10	10	-	-	-	-
1944	7	6	1	-	-	-
1945	5	4	1	-	-	-
1946	4	4	-	-	-	-
1947	3	2	-	-	-	1
1948	4	3	1	-	-	-
1949	6	6	-	-	-	-
1950	3	2	1	-	-	-
1951	5	4	1	-	-	-
1952	4	3	1	-	-	-
1953	4	3	1	-	-	-
1954	2	1	1	-	-	-
	—	—	—	-	-	-
	64	54	9	-	-	1

Year	Total No. of Cases	Straight Choice	Judgement	Revoked Confirmed or Varied	Split t/r	n/a
1955	2	1	1	-	-	-
1956	2	2	-	-	-	-
1957	2	2	-	-	-	-
1958	2	-	2	-	-	-
1959	3	1	1	-	-	1
1960	4	3	1	-	-	-
1961	3	1	2	-	-	-
1962	4	3	1	-	-	-
1963	5	5	-	-	-	-
1964	3	1	1	-	-	1
1965	6	4	1	-	1	-
1966	6	2	4	-	-	-
1967	3	1	2	-	-	-
1968	6	2	4	-	-	-
1969	5	1	4	-	-	-
1970	6	2	4	-	-	-
	126	85	37	-	1	3

Year	Total No. of Cases	Straight Choice	Judgement	Revoked Confirmed or Varied	Split t/r	n/a
1971	6	2	3	-	-	1
1972	7	1	5	-	1	-
1973	6	4	1	-	1	-
1974	14	3	10	-	1	-
1975	30	12	16	-	2	-
1976	31	17	14	-	-	-
1977	31	15	16	-	-	-
1978	43	26	15	-	2	-
1979	38	20	18	-	-	-
1980	29	13	14	2	-	-
1981	25	10	14	1	-	-
1982	24	13	9	2	-	-
1983	21	11	6	4	-	-
1984	19	9	8	2	-	-
1985	17	9	6	2	-	-
	467	250	192	13	8	4
		(53.5%)	(41.1%)	(2.8%)	(1.7%)	(0.9%)

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

(Sample of @ 1 in 10)

4. Issue (a)

Year	Total No. of Cases	Right	Interest	Mix
1942	7	6	1	-
1943	10	3	7	-
1944	7	3	4	-
1945	5	2	3	-
1946	4	1	3	-
1947	3	1	2	-
1948	4	1	3	-
1949	6	3	3	-
1950	3	2	1	-
1951	5	4	1	-
1952	4	3	1	-
1953	4	3	1	-
1954	2	1	1	-
	—	—	—	-
	64	33	31	-

Year	Total No. of Cases	Right	Interest	Mix
1955	2	2	-	-
1956	2	2	-	-
1957	2	1	-	1
1958	2	1	1	-
1959	3	-	3	-
1960	4	2	2	-
1961	3	2	1	-
1962	4	4	-	-
1963	5	5	-	-
1964	3	2	1	-
1965	6	4	2	-
1966	6	2	3	1
1967	3	1	2	-
1968	6	3	3	-
1969	5	2	3	-
1970	6	4	2	-
	126	70	54	2

Year	Total No. of Cases	Right	Interest	Mix
1971	6	5	1	-
1972	7	2	5	-
1973	6	5	1	-
1974	14	10	4	-
1975	30	24	6	-
1976	31	28	3	-
1977	31	23	8	-
1978	43	37	5	1
1979	38	32	6	-
1980	29	23	6	-
1981	25	12	12	1
1982	24	17	7	-
1983	21	15	6	-
1984	19	13	6	-
1985	17	13	4	-
	467	329	134	4
		(70.4%)	(28.7%)	(0.9%)

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

(Sample of @ 1 in 10)

4. Issue (b)

Year	Total No. of Cases	Pay and t/c	Grading	Dismissal and Disc.	Redundancy	Demarcation	Other
1942	7	7	-	-	-	-	-
1943	10	10	-	-	-	-	-
1944	7	7	-	-	-	-	-
1945	5	5	-	-	-	-	-
1946	4	3	-	-	-	1	-
1947	3	3	-	-	-	-	-
1948	4	3	1	-	-	-	-
1949	6	6	-	-	-	-	-
1950	3	3	-	-	-	-	-
1951	5	4	-	-	-	-	1
1952	4	2	-	1	-	1	-
1953	4	3	-	1	-	-	-
1954	2	2	-	-	-	-	-
	—	—	—	—	—	—	—
	64	58	1	2	-	2	1

Year	Total No. of Cases	Pay and t/c	Grading	Dismissal and Disc.	Redundancy	Demarcation	Other
1955	2	2	-	-	-	-	-
1956	2	2	-	-	-	-	-
1957	2	1	-	1	-	-	-
1958	2	2	-	-	-	-	-
1959	3	3	-	-	-	-	-
1960	4	3	-	-	-	1	-
1961	3	1	-	1	1	-	-
1962	4	3	-	-	-	1	-
1963	5	5	-	-	-	-	-
1964	3	1	-	2	-	-	-
1965	6	4	1	1	-	-	-
1966	6	5	1	-	-	-	-
1967	3	3	-	-	-	-	-
1968	6	4	-	1	-	1	-
1969	5	5	-	-	-	-	-
1970	6	3	-	3	-	-	-
	126	105	3	11	1	5	1

Year	Total No. of Cases	Pay and t/c	Grading	Dismissal and Disc.	Redundancy	Demarcation	Other
1971	6	4	-	2	-	-	-
1972	7	5	1	1	-	-	-
1973	6	5	-	-	-	-	1
1974	14	8	2	4	-	-	-
1975	30	18	4	7	-	-	1
1976	31	16	8	7	-	-	-
1977	31	14	4	9	2	-	2
1978	43	28	5	9	-	1	-
1979	38	23	10	5	-	-	-
1980	29	16	6	6	-	1	-
1981	25	16	5	4	-	-	-
1982	24	12	4	7	1	-	-
1983	21	12	3	5	1	-	-
1984	19	14	2	3	-	-	-
1985	17	13	-	3	-	-	1
	467	309	57	83	5	7	6
		(66.2%)	(12.2%)	(17.8%)	(1.1%)	(1.5%)	(1.3%)

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

5. Arbitrators' Remarks:-

Year	Total No. of Cases	Reasons	Reasoning	Recommendations	Other	None
1942	7	-	3	-	-	4
1943	10	-	2	1	2	5
1944	7	-	3	-	-	4
1945	5	-	3	-	-	2
1946	4	-	2	-	-	2
1947	3	-	1	-	1	1
1948	4	-	1	-	-	3
1949	6	-	3	-	-	3
1950	3	-	2	-	-	1
1951	5	-	2	-	-	3
1952	4	-	2	-	-	2
1953	4	-	1	1	-	3*
1954	2	-	-	-	-	2
	64	-	25	2	3	35

Year	Total No. of Cases	Reasons	Reasoning	Recommendations	Other	None
1955	2	-	-	-	-	2
1956	2	-	1	-	-	1
1957	2	-	-	1	-	1
1958	2	-	1	-	-	1
1959	3	-	1	-	-	2
1960	4	-	2	1	-	1
1961	3	-	2	-	-	1
1962	4	-	-	-	-	4
1963	5	-	2	-	-	3
1964	3	-	-	-	-	3
1965	6	-	1	-	-	5
1966	6	-	-	1	-	5
1967	3	-	-	-	-	3
1968	6	-	1	-	1	4
1969	5	-	3	2	1	-*
1970	6	-	4	3	2	-*
	126	-	43	10	7	71

Year	Total No. of Cases	Reasons	Reasoning	Recommendations	Other	None
1971	6	-	1	1	1	3
1972	7	-	1	-	3	3
1973	6	-	3	4	1	1*
1974	14	-	7	2	3	4*
1975	30	-	9	5	6	12*
1976	31	1	5	3	8	16*
1977	31	-	4	4	10	15*
1978	43	-	8	6	19	16*
1979	38	-	8	4	11	19*
1980	29	-	1	8	14	12*
1981	25	1	5	2	11	8*
1982	24	-	2	-	15	7
1983	21	-	1	1	14	5
1984	19	-	2	2	13	3*
1985	17	-	1	2	13	3*
	467	2	101	54	149	198
	[504][1]	(0.4%)	(20%)	(10.7%)	(29.6%)	(39.3%)

* Some cases involved more than one heading.

Notes:

[1] Totals 504 when all headings included.

ACAS

Summary

Arbitration Awards 1942-1985 (incl)

(Sample of @ 1 in 10)

6. Award

Year	Total No. of Cases	For Union	For Employer	Compromise	Varied	U/Q	n/a
1942	7	1	4	2	-	-	-
1943	10	4	2	4	-	-	-
1944	7	3	2	1	-	1	-
1945	5	-	1	4	-	-	-
1946	4	1	1	2	-	-	-
1947	3	2	-	-	-	1	-
1948	4	-	3	1	-	-	-
1949	6	2	3	1	-	-	-
1950	3	2	1	-	-	-	-
1951	5	2	1	1	-	-	1
1952	4	-	2	1	-	-	1
1953	4	1	2	1	-	-	-
1954	2	-	1	1	-	-	-
	64	18	23	19	-	2	2

Year	Total No. of cases.	For Union	For Employer	Compromise	Varied	U/Q	n/a
1955	2	2	-	-	-	-	-
1956	2	1	1	-	-	-	-
1957	2	-	1	1	-	-	-
1958	2	-	-	2	-	-	-
1959	3	-	2	1	-	-	-
1960	4	-	1	3	-	-	-
1961	3	1	1	1	-	-	-
1962	4	2	-	1	-	-	1
1963	5	1	3	2	-	-	-
1964	3	1	1	1	-	-	-
1965	6	2	3	1	-	-	-
1966	6	-	3	3	-	-	-
1967	3	-	1	2	-	-	-
1968	6	1	2	3	-	-	-
1969	5	1	1	2	-	1	-
1970	6	2	1	3	-	-	-
	126	32	44	44	-	3	3

Year	Total No. of cases	For Union	For Employer	Compromise	Varied	U/Q	n/a
1971	6	1	2	2	-	-	1
1972	7	2	3	1	-	1	-
1973	6	2	1	3	-	-	-
1974	14	3	8	3	-	-	-
1975	30	15	10	4	-	-	1
1976	31	10	16	4	-	1	-
1977	31	15	9	5	-	2	-
1978	43	8	20	10	-	4	1
1979	38	9	15	10	-	4	-
1980	29	6	14	9	-	-	-
1981	25	5	10	9	-	1	-
1982	24	10	7	5	1	1	-
1983	21	10	6	4	1	-	-
1984	19	5	8	5	-	1	-
1985	17	5	10	2	-	-	-
	467	138	183	120	2	18	6
		(29.6%)	(39.2%)	(25.7%)	(0.4%)	(3.9%)	(1.3%)

ACAS

Summary Arbitration Awards 1942-1985 (incl).

Interest Cases - Pay and terms and conditions of employment Only

r	Total No. of Cases	private Sector	Public Sector	J	SC	t/r n/a	Split	For Union	For Employer	Compro-mise	U/
2	1	1	-	1	-	-	-	-	-	1	-
3	7	7	-	-	7	-	-	2	1	4	-
4	4	4	-	1	3	-	-	-	2	1	1
5	3	3	-	1	2	-	-	-	-	3	-
6	3	3	-	-	3	-	-	1	-	2	-
7	2	2	-	-	1	1	-	1	-	-	1
8	3	3	-	1	2	-	-	-	2	1	-
9	3	3	-	-	3	-	-	1	1	1	-
0	1	1	-	1	-	-	-	-	1	-	-
1	1	1	-	1	-	-	-	-	-	1	-
2	1	-	1	1	-	-	-	-	-	1	-
3	1	-	1	1	-	-	-	-	-	1	-
4	1	1	-	1	-	-	-	-	-	1	-
	31	29	2	9	21	1	-	5	7	17	2

ar	Total No. of Cases	Private Sector	Public Sector	t/r J	t/r SC	t/r n/a	Split	For Union	For Empl.	Compro-mise	U/Q
55	-	-	-	-	-	-	-	-	-	-	-
56	-	-	-	-	-	-	-	-	-	-	-
57	-	-	-	-	-	-	-	-	-	-	-
58	1	-	1	1	-	-	-	-	-	1	-
59	3	2	1	1	1	1	-	-	2	-	1
60	2	2	-	1	1	-	-	-	1	1	-
61	1	-	1	1	-	-	-	-	-	1	-
62	-	-	-	-	-	-	-	-	-	-	-
63	-	-	-	-	-	-	-	-	-	-	-
64	1	1	-	1	-	-	-	-	-	1	-
65	2	2	-	2	-	-	-	-	-	2	-
66	3	3	-	3	-	-	-	-	1	2	-
67	2	1	1	1	1	-	-	-	1	1	-
68	3	3	-	3	-	-	-	-	-	3	-
69	3	3	-	3	-	-	-	-	-	2	1
70	2	1	1	2	-	-	-	-	-	2	-
	54	47	7	28	24	2	-	5	12	33	4

ear	Total No. of Cases	Private Sector	Public Sector	J	SC	t/r n/a	Split	For Union	For Employer	Compro-mise	U/
971	1	-	1	1	-	-	-	-	-	1	-
972	5	3	2	4	1	-	-	1	2	2	-
973	1	1	-	1	-	-	-	1	-	-	-
974	4	4	-	3	-	-	1	2	-	2	-
975	6	5	1	6	-	-	-	1	2	3	-
976	3	3	-	3	-	-	-	1	1	1	-
977	8	5	3	6	2	-	-	3	3	2	-
978	5	3	2	4	1	-	-	1	1	2	1
979	6	5	1	5	1	-	-	-	1	5	-
980	6	4	2	5	1	-	-	-	3	3	-
981	12	10	2	8	4	-	-	1	4	7	-
982	7	5	2	5	2	-	-	3	-	4	-
983	6	5	1	4	2	-	-	1	2	3	-
984	6	6	-	4	2	-	-	1	1	4	-
985	4	2	2	3	1	-	-	2	-	2	-
	134	108	26	90	41	2	1	23	32	74	5
		(80.6%)	(19.4%)	(67.2%)	(30.6%)	(1.5%)	(0.7%)	(17.2%)	(23.9%)	(55.2%)	(3.

Survey of Arbitration and Mediation Procedures

Summary of Dismissal and Discipline Cases

1974-1985 (incl)

Arbitration and Mediation

Alice Brown
September 1986

Summary

Dismissal and Discipline Cases 1974-1985 (incl)

(Arbitration and Mediation)

Year	Total No. of Cases	Dismissal Cases Only	Discipline Cases Only	Annual Report Figures	(% of all Cases)
					%
1974	22	18	4	14[1]	
1975	39	29	10	46	15.0
1976	33	22	11	33	10.2
1977	40	26	14	46	14.0
1978	39	20	19	39	9.2
1979	40	21	19	40	10.1
1980	50	30	20	51	15.8
1981	61	44	17	62	24.1
1982	49	39	10	49	19.5
1983	51	30	21	51	24.6
1984	63	43	20	63	31.2
1985	43	35	8	43	26.0
	530	357	173	537	
		(67.4%)	(32.6%)		

Notes:-

[1] 1974 ACAS Report figures from September-December only.

ACAS

Summary

Dismissal and Discipline Cases 1974-1985 (incl)

(Arbitration and Mediation)

Year	Total No. of Cases	For Union	For Employer	Penalty Varied[1]	Penalty Reduced[2]		Notes
1974	22 (23)	8	15	-	2	[1	Split decision - more than one employee]
1975	39 (40)	23	12	4	12	[1	Split decision - more than one employee]
						1	Arbitration withdrawn
1976	33	19	11	3	6		
1977	40	20	17	3	8		
1978	39	17	17	5	7		
1979	40	15	20	5	6		
1980	50	19	23	8	9		
1981	61	26	24	9	9	2	Unquantifiable
1982	49	18	28	3	8		
1983	51	17	27	6	3	1	Arbitration withdrawn
1984	63	17	35	7	7	2	Arbitration withdrawn
						2	Unquantifiable
1985	43	22	20	1	13		
	530 [532][3]	221 (41.5%)	249 (46.8%)	54 (10.15%)	90 (n/a)	8 (1.5%)	

Notes:-

[1] Applies to Discipline Cases only.
[2] Applies to Dismissal Cases only.
[3] Totals 532 when 2 split decisions are included.

ACAS

Summary

Dismissal Cases Only 1974-1985 (incl)

(Arbitration and Mediation)

Year	Total No. of Cases	For Union	For Employer	Reduced Penalty		Notes
1974	18 (19)	8	11	2	[1	Split decision - more than one employee]
1975	29 (30)	21	8	12	[1	Split decision - more than one employee]
					1	Arbitration withdrawn
1976	22	16	6	6		
1977	26	15	11	8		
1978	20	12	8	7		
1979	21	9	12	6		
1980	30	14	16	9		
1981	44	23	19	9	2	Unquantifiable
1982	39	15	24	8		
1983	30	11	18	3	1	Arbitration withdrawn
1984	43	15	26	7	2	Arbitration withdrawn
1985	35	19	16	13		
	357 [359][1]	178 (49.6%)	175 (48.7%)	90 (25% of all cases 50.6% of cases 'For Union')	6 (1.7%)	

Notes:-

[1] Totals 359 when 2 split decisions are included.

APPENDIX III

SURVEY OF ACAS ARBITRATION SERVICE 1988-1989

RESULTS OF QUESTIONNAIRE SURVEY

OF PARTIES TO ARBITRATION IN 1988

INTRODUCTION

Questionnaires were issued over a one year period (July 1988 to June 1989) to parties involved in Arbitration during the year 1988. A total of 223 Questionnaires were issued to parties involved in Single Arbitration and Boards of Arbitration. No Questionnaires were issued in respect of Mediation, Police Arbitration Tribunals or the Central Arbitration Committee. In view of the specific nature of references to Arbitration from the Electricity Supply Industry (ESI), where reference to an Independent Person is the final stage of their disciplinary procedure, a separate form was issued.

Before proceeding with the survey, pilot Questionnaires were distributed to a sample group of parties involved in Arbitration, and I am grateful to all those who took part in this preliminary exercise for their helpful suggestions. I should like to record my thanks also to my colleagues at Edinburgh University Professor Frank Bechhofer (Research Centre for Social Sciences), Ian Sams (Business Studies) and Phil White (Business Studies) for their constructive and useful comments.

The administrative and professional support of ACAS staff was indispensable to the project and I would like to record my thanks to Alastair Campbell, Richard Harrison and Moira Shirra. I should also like to express my gratitude to Dr Jim Smyth (Edinburgh University) who assisted with the analysis of the Questionnaires.

Finally, my thanks to those who, in spite of increasing work pressures, gave their time to completing and returning the Questionnaire.

RESPONSE RATE:

A total of 223 Questionnaires were issued	161 Single and Board cases 62 ESI cases
203 Questionnaires were returned completed	91.0% response rate
An additional 3 responses were received, where forms could not be completed, making a total of 206 responses in all	92.4% response rate
Of the 203 Questionnaires received	149 Single and Board Cases (92.5% response rate) 54 ESI cases (87% response rate)

BREAKDOWN OF RESPONSES:

A total of 198 Questionnaires were analysed. Five responses were excluded from the analysis, in view of the particular nature of the case which involved a dispute between 5 unions regarding union representation on a Negotiating Body.

Of the 198 responses	96 from Employers	48.5%
	100 from Trade Unions	50.5%
	2 'Other'	1.0%
Of the 198 responses	139 Single Arbitration	70.2%
	5 Boards Arbitration	2.5%
	54 Electricity Supply	27.3%

Question 1: **"How did this particular dispute come to be referred to Arbitration?"**

Excluding ESI cases:

		Total No.	%
(a)	Union request	31	21.5%
(b)	Employer request	10	6.9%
(c)	Joint union and employer request	94	65.3%
(d)	ACAS suggestion	2	1.4%
(e)	Other *	7	4.9%

*Most referred to inclusion of arbitration in procedure agreements.

Question 2: **"Which of the following was the main subject of the dispute?"**

Excluding ESI cases:

		Total No.	%
(a)	General Pay and Conditions	36	25.0%
(b)	Grading	30	20.8%
(c)	Other pay matters and conditions of employment not part of general pay claim	35	24.3%
(d)	Trade Union Recognition	-	-
(e)	Changes in Working Practices	7	4.9%
(f)	Other Trade Union matters	1	0.7%
(g)	Redundancy	2	1.4%
(h)	Dismissal/Discipline	21	14.6%
(i)	Other Issues	11	7.6%
	No Response	1	0.7%

Question 3: **"Which types of occupation were directly involved in the dispute?"**

Excluding ESI cases:

		Total No.	%
(a)	Managerial/Administrative	21	14.6%
(b)	Scientific/Professional	26	18.1%
(c)	Clerical	23	16.0%
(d)	Supervisory	26	18.1%
(e)	Skilled Workers	34	23.6%
(f)	Semi-skilled Workers	46	31.9%
(g)	Unskilled Workers	35	21.3%
(h)	Others	19	13.2%

[More than one category applies to some cases]

Question 4: **"How many employees were directly involved in the dispute?"**

Excluding ESI cases:

		Total No.	%
(a)	Under 20	81	56.3%
(b)	21-49	15	10.4%
(c)	50-99	14	9.7%
(d)	100-199	13	9.0%
(e)	200-499	11	7.6%
(f)	500-999	4	2.8%
(g)	1000+	2	2.8%
	No Response	2	1.4%

Question 5: "Did the dispute involve any industrial action?"

Excluding ESI cases:

		Total No.	%
(a)	Yes, strike action was taken	11	7.6%
(b)	Yes, but only action short of a strike was taken	7	4.9%
(c)	No, but industrial action was threatened	27	18.8%
(d)	No action was threatened or taken	98	68.1%
	No response	1	0.7%

Question 6: "If strike action was taken, when was it taken?"

Excluding ESI cases:

		Total No.	%
(a)	Before the agreement to refer the dispute to arbitration	12	8.3%
(b)	Between then and the arbitration hearing itself	3	2.1%
(c)	Between the hearing and the issue of the award by the Arbitrator	-	-
(d)	After the award was issued	-	-

Question 7: **"Do you have a procedure agreement for dealing with this type of dispute?"**

Excluding ESI cases:

	Total No.	%
Yes	127	88.2%
No	15	10.4%
No Response	2	1.4%

(a): "Is ACAS conciliation explicitly required or permitted by the procedure agreement?"

Excluding ESI cases:

		Total No.	%
(i)	Required	29	20.1%
(ii)	Permitted	74	51.4%
(iii)	Not Mentioned	25	17.4%
(iv)	No Response	16	11.1%

(b): "Is ACAS arbitration explicitly required or permitted by the procedure agreement?"

Excluding ESI cases:

		Total No.	%
(i)	Required	28	19.4%
(ii)	Permitted, at the request of one party only	19	13.2%
(iii)	Permitted by agreement between the parties	70	48.6%
(iv)	Not Mentioned	11	7.6%
(v)	No Response	16	11.1%

(c): "If ACAS arbitration is required or permitted by the procedure agreement, does the agreement place specific restrictions on the arbitrator?"

Excluding ESI cases:

		Total No.	%
(i)	Yes, the arbitrator can only decide either for the employer's or for the union's final position (pendulum arbitration)	16	11.1%
(ii)	Yes, there are other restrictions on the arbitrator's decision	8	5.6%
(iii)	No, the arbitrator is free to award as he/she thinks appropriate	91	63.2%
	No response	29	20.1%

Question 8: **"Was there a conciliation meeting under ACAS auspices before the reference was made to arbitration?"**

Excluding ESI cases:

	Total No.	%
Yes	94	65.3%
No	48	33.3%
No response	2	1.4%

"DID THE CONCILIATOR:-

(a): Explain the various methods available?"

	Total No.	%
Yes	80	55.6%
No	8	5.6%
Don't know	4	2.8%
No response	52	36.1%

(b): Adequately explain the arbitration procedure?"

	Total No.	%
Yes	96	66.7%
No	1	0.7%
Don't know	1	0.7%
No response	46	31.9%

(c): Explain the binding nature of arbitration

	Total No.	%
Yes	86	59.7%
No	5	3.5%
Don't know	1	0.7%
No response	52	36.1%

(d): Assist with the wording of the terms of reference?"

	Total No.	%
Yes	88	61.1%
No	10	6.9%
Don't know	-	-
No response	46	31.9%

Question 9: **"The following questions concern the attitude of the parties towards arbitration and the issues in dispute"**

Excluding ESI cases:

(a) Both parties were keen to use arbitration:

	Employers	T.U.s	Total No.	%
Yes	37	38	75	52.1%
No	24	20	44	30.6%
Don't Know	4	4	8	5.6%
No Response	6	11	17	11.8%

(b) The relationship between the two parties was very hostile:

	Employers	T.U.s	Total No.	%
Yes	8	17	25	17.4%
No	51	33	84	58.3%
Don't Know	1	-	1	0.7%
No response	11	23	34	23.6%

(c) The differences separating the parties was very large:

	Employers	T.U.s	Total No.	%
Yes	37	36	73	50.7%
No	22	16	38	26.4%
Don't Know	1	-	1	0.7%
No response	11	21	32	22.2%

(d) There were important matters of principle at stake in this dispute:

	Employers	T.U.s	Total No.	%
Yes	47	48	95	66.0%
No	16	10	26	18.1%
Don't Know	-	1	1	0.7%
No response	8	14	22	15.3%

Question 10: "How was the method of arbitration decided?"

Excluding ESI cases:

		Employers	T.U.s	Total No.	%
(a)	It was agreed at conciliation	26	33	59	41.0%
(b)	It was agreed between the parties before ACAS involvement	17	14	31	21.5%
(c)	It was laid down in the procedure	25	21	46	31.9%
(d)	Other *	3	4	7	4.9%
	No response	-	1	1	0.7%

* Sample answers to this question:

"It was agreed after conciliation and following industrial action."

"It was proposed by the union as an alternative to strike action."

"It was arrived at after a number of meetings with the parties and ACAS."

Question 11: "Were there agreed terms of reference?"

Excluding ESI cases:

	Employers	T.U.s	Total No.	%
Yes	70	71	141	97.9%
No	1	2	3	2.1%

Question 12: "Did the terms of reference:"

Excluding ESI cases:

		Employers	T.U.s	Total No.	%
(a)	require the arbitrator to choose the employer's or the union's final position?	25	14	39	27.1%
(b)	restrict the arbitrator's award in other ways?	8	6	14	9.7%
(c)	leave the arbitrator free to award as he/she thought appropriate?	38	52	90	62.5%
	No response	-	1	1	0.7%

Question 13: **"Did the terms of reference cover all the issues which needed to be settled by the reference to arbitration?"**

Excluding ESI cases:

	Employers	T.U.s	Total No.	%
Yes	65	66	131	91.0%
No	6	4	10	6.9%
No response	-	3	3	2.1%

Question 14: **"Where did the arbitration hearing take place?"**

Excluding ESI cases:

		Total No.	%
(a)	On ACAS Premises	61	42.4%
(b)	On employer's premises	79	54.9%
(c)	On Trade Union premises	-	-
(d)	Other	4	2.8%

Question 15: **"Did the arbitrator make a site visit as part of the reference?"**

Excluding ESI cases:

	Total No.	%
Yes	42	29.2%
No	99	68.8%
No Response	3	2.1%

Question 16: **"The following questions concern the organisation of the arbitration"**

Excluding ESI cases:

(a) The other party's written submission was received in time to study it before the hearing:

	Employers	T.U.s	Total No.	%
Yes	65	59	124	86.1%
No	5	10	15	10.4%
No response	1	4	5	3.5%

(b) The hearing was arranged promptly:

	Employers	T.U.s	Total No.	%
Yes	62	61	123	85.4%
No	7	4	11	7.6%
No response	2	8	10	6.9%

(c) The practical arrangements for the hearing were satisfactory:

	Employers	T.U.s	Total No.	%
Yes	67	65	132	91.7%
No	2	1	3	2.1%
No response	2	7	9	6.3%

(d) The award was issued promptly:

	Employers	T.U.s	Total No.	%
Yes	58	61	119	82.6%
No	10	8	18	12.5%
No response	3	4	7	4.9%

Question 17: "Who chose the arbitrator?"

Excluding ESI cases:

		Total No.	%
(a)	The parties	23	16.0%
(b)	ACAS, after consulting the parties	60	41.7%
(c)	ACAS	55	38.2%
	No response	6	4.2%

Question 18: **"The following questions concern the role of the arbitrator in the arbitration proceedings."**

All cases:

(a) Made clear his/her role in the dispute:

	Employers	T.U.s	Total No.	%
Agree	94	100	194	98.0%
Partly Agree	1	-	1	0.5%
Disagree	1	-	1	0.5%
No response	-	2	2	1.0%

(b) Allowed you sufficient time to state your case:

	Employers	T.U.s	Total No.	%
Agree	91	97	188	94.9%
Partly Agree	2	1	3	1.5%
Disagree	-	1	1	0.5%
No response	3	3	6	3.1%

(c) Allowed you sufficient opportunity to question the other party:

	Employers	T.U.s	Total No.	%
Agree	89	97	186	93.9%
Partly Agree	3	1	4	2.0%
Disagree	1	1	2	1.0%
No response	3	3	6	3.1%

(d) Addressed questions to both parties:

	Employers	T.U.s	Total No.	%
Agree	92	96	188	94.9%
Partly Agree	1	2	3	1.5%
Disagree	-	1	1	0.5%
No response	3	3	6	3.1%

(e) Conducted the hearing to your satisfaction:

	Employers	T.U.s	Total No.	%
Agree	81	92	173	87.4%
Partly Agree	11	6	17	8.6%
Disagree	2	2	4	2.0%
No response	2	2	4	2.0%

(f) Independent Person made clear the role of the Assessors (ESI cases only):

	Employers	T.U.s	Total No.	%
Agree	19	27	46	85.2%
Partly Agree	4	-	4	7.4%
Disagree	1	2	3	5.6%
No response	1	-	1	1.9%

Question 19: **"The following questions concern the characteristics of the arbitrator in the proceedings."**

All cases:

(a) Acted impartially:

	Employers	T.U.s	Total No.	%
Agree	87	89	176	88.9%
Partly Agree	7	5	12	6.1%
Disagree	1	3	4	2.0%
No response	1	5	6	3.1%

(b) Handled matters confidently:

	Employers	T.U.s	Total No.	%
Agree	84	95	179	90.4%
Partly Agree	10	4	14	7.1%
Disagree	-	1	1	0.5%
No response	2	2	4	2.0%

(c) Had your trust:

	Employers	T.U.s	Total No.	%
Agree	85	71	156	78.8%
Partly Agree	9	20	29	14.6%
Disagree	1	4	5	2.5%
No response	1	7	8	4.0%

(d) Had sufficient experience/ knowledge about industrial relations:

	Employers	T.U.s	Total No.	%
Agree	69	81	150	75.8%
Partly Agree	21	15	36	18.2%
Disagree	1	-	1	0.5%
No response	5	6	11	5.6%

(e) Sufficiently understood the issues involved:

	Employers	T.U.s	Total No.	%
Agree	74	78	152	76.8%
Partly Agree	18	15	33	16.7%
Disagree	3	3	6	3.0%
No response	1	6	7	3.5%

(f) Acted in a courteous and friendly manner:

	Employers	T.U.s	Total No.	%
Agree	90	101	191	96.5%
Partly Agree	5	-	5	2.5%
Disagree	-	-	0	0
No response	1	1	2	1.0%

(g) Acted according to your expectations:

	Employers	T.U.s	Total No.	%
Agree	67	85	152	76.8%
Partly Agree	20	9	29	14.6%
Disagree *	7	5	12	6.1%
No response	2	3	5	2.5%

* Those who disagreed were asked for their reasons. Some of those who partly agreed also gave comments. Sample comments are as follows:

1. Employer Side:

"I expected him to find for the company."

"We felt that a more thorough knowledge of our standard grading formula may have been useful."

"Disallowed Industrial Tribunal case law and precedent."

"He took a legalistic approach."

"Did not explain to the appellant how the proceedings would be handled."

"This is the first independent body of perhaps twelve I have been involved in where the co-presenters' role has been limited."

2. Trade Union Side:

"I expected a partly favourable outcome based on the strength of the individual case."

"Did not visit site (very important in this case). Too readily accepted manager's word. allowed the company side wider discretion."

"Arbitrator gave too much weight in his decision to the company's ability to pay. This as not within his terms of reference and unless specifically asked should not take that into account.

"Hoped for impartiality."

"He allowed adjournment for employers to prepare case on 'fresh' evidence (one week)."

Question 20: "What was the outcome of the arbitration?"

All cases:

		Employers	T.U.s	Total No.	%
(a)	The arbitrator found for the employer's position	41	39	80	40.4%
(b)	The arbitrator found for the union's position	25	35	60	30.3%
(c)	It was a compromise award	29	25	54	27.3%
	No response	1	3	4	2.0%

Single and Board cases only:

		Total No.	%
(a)	The arbitrator found for the employer's position	48	33.3%
(b)	The arbitrator found for the union's position	56	38.9%
(c)	It was a compromise award	37	25.7%
	No response	3	2.1%

ESI cases only:

		Total No.	%
(a)	The arbitrator found for the employer's position	32	59.3%
(b)	The arbitrator found for the union's position	4	7.4%
(c)	It was a compromise award	17	31.5%
	No response	1	1.9%

Question 21: "The following questions concern the arbitrator's report."

All cases:

(a) It was clear and to the point:

	Employers	T.U.s	Total No.	%
Yes	87	92	179	90.4%
No	6	6	12	6.1%
Don't Know	2	-	2	1.0%
No response	1	4	5	2.5%

(b) It adequately summarised each party's case:

	Employers	T.U.s	Total No.	%
Yes	88	95	183	92.4%
No	4	5	9	4.6%
Don't Know	-	1	1	0.5%
No response	4	1	5	2.5%

(c) It stayed within the terms of reference laid down:

	Employers	T.U.s	Total No.	%
Yes	89	95	184	92.9%
No	2	3	5	2.5%
Don't Know	2	1	3	1.5%
No response	3	3	6	3.0%

(d) It gave some indication of how the arbitrator reached his/her award:

	Employers	T.U.s	Total No.	%
Yes	79	79	158	79.8%
No	13	15	28	14.1%
Don't Know	-	2	2	1.0%
No response	4	6	10	5.1%

(e) The award was unambiguous:

	Employers	T.U.s	Total No.	%
Yes	79	76	155	78.3%
No	15	16	31	15.7%
No response	2	10	12	6.1%

(f) The award was fair:

	Employers	T.U.s	Total No.	%
Yes	67	72	139	70.2%
No	14	22	36	18.2%
Don't Know	11	3	14	7.1%
No response	4	5	9	4.5%

ESI cases only:

(g) The award was issued promptly:

	Employers	T.U.s	Total No.	%
Yes	18	14	32	59.3%
No	5	10	15	27.8%
Don't Know	1	2	3	5.6%
No response	1	3	4	7.4%

(h) Did any difficulties arise in the implementation of the award:

	Total No.	%
Yes *	11	20.4%
No	37	68.5%
No response	6	11.11%

* Respondents were asked to give reasons. Sample comments are as follows:

1. Employer Side:

"The ambiguous nature of the award gave scope for the TU side to dispute the Board's interpretation of it."

"Personal difficulties with staff in returning employee to same location - needed by agreement later to transfer to another site."

"It was difficult to implement the proposal that the individual be given work at a certain grade since only one post was available within the jurisdiction of the manager concerned and other managers would be more than reluctant to take on someone who had been subject to disciplinary proceedings into a post which would provide a promotional route for another member of staff."

"The penalty quashed a downgrading and substituted one week's suspension without pay. Due to the length of time between the original decision and the ACAS result the loss of pay due to downgrading was substantially more than 1 week's pay and so we actually paid money back to the offender and so it was not perceived by others that any penalty had been suffered."

"The appellant had obtained another job almost immediately after his dismissal. The problem of 'double earnings' had to be resolved relative to the period to the date of reinstatement."

2. Trade Union Side:

"The appellant did not immediately return to his employment due to his own lethargy."

"The difficulty may arise in implementing that part of the award which calls for a 'review of the situation after 12 months'."

""Whilst the award said Mr X should be transferred to another post at the same or another location, the Board interpreted this as a downgrading by some 10 or so incremental points (value approximately £2,000) plus transfer to a 'remote' site not too accessible by Mr X, further adding to his financial loss. I have called upon the Electricity Council to seek guidance on this interpretation from Professor Y.

Question 22: **"How would you describe the contribution of the award to the settlement of the issues in dispute?"**

Excluding ESI cases:

(i) So far, since the award was issued:

	Employers	T.U.s	Total No.	%
Excellent	13	17	30	20.8%
Very Good	18	13	31	21.5%
Good	22	21	44	30.6%
Moderate	12	13	25	17.4%
Poor	3	7	10	6.9%
No response	3	1	4	2.8%

(ii) In the longer term:

	Employers	T.U.s	Total No.	%
Excellent	13	12	25	17.4%
Very Good	16	10	26	18.1%
Good	19	22	41	28.5%
Moderate	12	13	25	17.4%
Poor	7	7	14	9.7%
No response	4	9	13	9.0%

If the answer to (i) or (ii) was Moderate or Poor, respondents were asked to explain the reason:

		Employers	T.U.s	Total No.	%
(a)	The terms of reference asked the arbitrator the wrong question	-	5	5	3.5%
(b)	The award was deficient	5	5	10	6.9%
(c)	There was another reason *	14	12	26	18.1%
	Not applicable			103	71.5%

* Respondents were asked to state reasons, although some who answered (a) or (b) also commented. Sample comments are as follows:

1. Employer Side:

"The workforce were not satisfied with the outcome and this has led to claims for payment for duties previously regarded as part of the normal conditions of employment."

"First time use of arbitration and union lost. Now it will be difficult to get their acceptance to try again."

"The award offered a solution to the problem but not the principle concerned."

"The Conciliation Board asked for a response to a matter of dispute on the agreement. The award has been used by the union as a tool for a broader settlement."

"Award will force company to restructure their operations."

"It establishes the principle of one group of workers receiving more holiday entitlement."

"It settled the immediate dispute but has incorporated a structural problem into our pay scales."

2. Trade Union Side:

"Company found itself later unable to fund the award."

"Management undermined the award."

"Total package too black and white and because the loss of the decision may influence against the choice of pendulum in the future."

"The company has given notice of intent to tear the agreement up anyway on the grounds that the balance of power is theirs and so who needs arbitration."

"It has given scope to management to deal with this type of issue in a less detailed and fair manner."

"Arbitration gives a 'result' - it does not necessarily solve the problem - a 'dispute' still lingers on."

Question 23: **"Would you use ACAS arbitration again if a similar dispute arose in the future?"**

Excluding ESI cases:

	Employers	T.U.s	Total No.	%
Yes	59	65	124	86.1%
No *	9	3	12	8.3%
Possibly	1	4	5	3.5%
No response	2	1	3	2.1%

* Respondents were asked to give a reason for their answer. Sample comments are as follows:

1. Employer Side:

"Insufficient understanding of background to the dispute."

"The company believes that the binding arbitration clause in the procedure has a 'chilling' effect on the negotiations which has resulted in arbitration in two of the last three years' negotiations.

"Logic of the award was wrong. Want to be our own master."

"Inconsistency of witnesses not under oath, with limited opportunity to cross-examine."

"There was and remains a feeling that an arbitrator is inclined to be sympathetic to and find for the underdog (ie employee) whatever the long-term ramifications of the problem are for the employer."

"Union side have nothing to lose in that they don't have to give anything even if arbitration goes against them."

2. Trade Union Side:

"The merits of the case are irrelevant if arbitrators take on face value that the company is unable to afford an award."

"We renegotiated the part of the agreement which gave rise to the problem in the first place."

"Possibly, if we could not get the necessary industrial action."

Question 24: **"Please indicate if you agree or disagree with the following statements."**

Excluding ESI cases:

(a) Management representatives are generally reluctant to put a dispute to arbitration:

	Employers	T.U.s	Total No.	%
Agree	43	52	95	66.0%
Disagree	20	11	31	21.5%
Don't Know	6	9	15	10.4%
No response	2	1	3	2.1%

(b) Union representatives are generally reluctant to put a dispute to arbitration:

	Employers	T.U.s	Total No.	%
Agree	21	22	43	29.9%
Disagree	35	45	80	55.6%
Don't Know	14	4	18	12.5%
No response	1	2	3	2.1%

(c) The stronger party in a dispute will not usually want to go to arbitration:

	Employers	T.U.s	Total No.	%
Agree	34	44	78	54.2%
Disagree	22	23	45	31.3%
Don't Know	13	4	17	11.8%
No response	2	2	4	2.8%

(d) An organisation which agrees to arbitration improves its public image:

	Employers	T.U.s	Total No.	%
Agree	33	45	78	54.2%
Disagree	15	15	30	20.8%
Don't Know	22	12	34	23.6%
No response	1	1	2	1.4%

(e) Arbitration should not take place until all agreed procedures for negotiations have been exhausted, or a deadlock in the negotiations reached:

	Employers	T.U.s	Total No.	%
Agree	68	69	137	95.1%
Disagree	-	1	1	0.7%
Don't Know	2	2	4	2.8%
No response	1	1	2	1.4%

(f) Arbitration should not take place until an attempt has been made to resolve a dispute through conciliation:

	Employers	T.U.s	Total No.	%
Agree	56	60	116	80.6%
Disagree	12	8	20	13.9%
Don't Know	1	2	3	2.1%
No response	2	3	5	3.5%

(g) Arbitration should not take place while industrial action is occurring:

	Employers	T.U.s	Total No.	%
Agree	46	16	62	43.1%
Disagree	16	51	67	46.5%
Don't Know	7	5	12	8.3%
No response	2	1	3	2.1%

(h) Arbitration should be written into procedure agreements:

	Employers	T.U.s	Total No.	%
i. As a final voluntary stage:				
Agree	37	35	72	50.0%
Disagree	13	11	24	16.7%
Don't Know	2	-	2	1.4%
No response	19	27	46	31.9%
ii. As a final stage either party can invoke:				
Agree	19	25	44	30.6%
Disagree	13	11	24	16.7%
Don't Know	3	1	4	2.8%
No response	36	36	72	50.0%
iii. As an automatic final stage:				
Agree	11	10	21	14.6%
Disagree	18	17	35	24.3%
Don't Know	2	-	2	1.4%
No response	40	46	86	59.7%

(i) A disadvantage of arbitration is that parties sometimes become addicted to its use:

	Employers	T.U.s	Total No.	%
Agree	35	31	66	45.8%
Disagree	12	29	41	28.5%
Don't Know	21	12	33	22.9%
No response	3	1	4	2.8%

(j) Arbitration is a valuable way of resolving some disputes:

	Employers	T.U.s	Total No.	%
Agree	65	71	136	94.4%
Disagree	1	-	1	0.7%
Don't Know	3	-	3	2.1%
No response	2	2	4	2.8%

(k) Without ACAS arbitration the number of stoppages in industry would increase:

	Employers	T.U.s	Total No.	%
Agree	37	49	86	59.7%
Disagree	3	10	13	9.0%
Don't Know	29	13	42	29.2%
No response	2	1	3	2.1%

Question 25: "The Arbitrator should:-"

All cases:

(a) See his/her primary job as settling the dispute:

	Employers	T.U.s	Total No.	%
Agree	78	89	167	84.3%
Disagree	14	4	18	9.1%
Don't Know	2	5	7	3.5%
No response	2	4	6	3.0%

(b) Not have any recent direct association with management:

	Employers	T.U.s	Total No.	%
Agree	70	85	155	78.3%
Disagree	12	7	19	9.6%
Don't Know	10	1	11	5.6%
No response	4	9	13	6.6%

(c) Not have any recent direct association with a union:

	Employers	T.U.s	Total No.	%
Agree	70	78	148	74.7%
Disagree	12	11	23	11.6%
Don't Know	10	3	13	6.6%
No response	4	10	14	7.1%

Excluding ESI cases:

(d) In disputes over pay, take into account:

	Employers	T.U.s	Total No.	%
(i) ability to pay:				
Agree	62	41	103	71.5%
Disagree	3	21	24	16.7%
Don't Know	3	6	9	6.3%
No response	3	5	8	5.6%
(ii) comparability:				
Agree	56	60	116	80.6%
Disagree	8	6	14	9.7%
Don't Know	4	2	6	4.2%
No response	3	5	8	5.6%

(iii) the rate of inflation:

Agree	40	51	91	63.2%
Disagree	20	12	32	22.2%
Don't Know	6	2	8	5.6%
No response	5	8	13	9.0%

(iv) the general public interest:

Agree	37	15	52	36.1%
Disagree	21	42	63	43.8%
Don't Know	7	8	15	10.4%
No response	6	8	14	9.7%

All cases:

(e) Give an indication of how he/she arrived at the award:

	Employers	T.U.s	Total No.	%
Agree	92	91	183	92.4%
Disagree	1	3	4	2.0%
Don't Know	2	1	3	1.5%
No response	1	7	8	4.0%

(f) Make recommendations to one or both sides if he/she sees other problems between the parties not covered by the terms of reference:

	Employers	T.U.s	Total No.	%
Agree	55	82	137	69.2%
Disagree	32	13	45	22.7%
Don't Know	6	-	6	3.0%
No response	3	7	10	5.1%

Question 26: **"In your view, which of the following qualities are important for effective arbitration."**

All cases:

(a) impartiality:

	Employers	T.U.s	Total No.	%
Essential	91	94	185	93.4%
Important	4	4	8	4.0%
Not important	-	1	1	0.5%
No response	1	3	4	2.0%

(b) Industrial or commercial experience:

	Employers	T.U.s	Total No.	%
Essential	53	45	98	49.5%
Important	40	41	81	40.9%
Not important	2	13	15	7.6%
No response	1	4	4	2.0%

(c) Knowledge of industrial relations and collective bargaining:

	Employers	T.U.s	Total No.	%
Essential	55	78	133	67.2%
Important	36	20	56	28.3%
Not important	3	1	4	2.0%
No response	2	3	5	2.5%

(d) Knowledge of the particular industry involved in the dispute:

	Employers	T.U.s	Total No.	%
Essential	15	18	33	16.7%
Important	38	36	74	37.4%
Not important	41	45	86	43.4%
No response	2	3	5	2.5%

(e) Independence:

	Employers	T.U.s	Total No.	%
Essential	77	84	161	81.3%
Important	18	15	33	16.7%
No response	1	3	4	2.0%

(f) Authority:

	Employers	T.U.s	Total No.	%
Essential	54	59	113	57.1%
Important	39	34	73	36.9%
Not important	2	4	6	3.0%
No response	1	5	6	3.0%

(g) A sense of humour:

	Employers	T.U.s	Total No.	%
Essential	13	28	41	20.7%
Important	47	50	97	49.0%
Not important	33	20	53	26.8%
No response	3	4	7	3.5%

(h) Experience in settling disputes by arbitration:

	Employers	T.U.s	Total No.	%
Essential	31	47	78	39.4%
Important	54	42	96	48.5%
Not important	10	9	19	9.6%
No response	1	4	5	2.5%

(i) An ability to understand complex problems quickly:

	Employers	T.U.s	Total No.	%
Essential	66	73	139	70.2%
Important	29	26	55	27.8%
No response	1	3	4	2.0%

(j) Originality of ideas:

	Employers	T.U.s	Total No.	%
Essential	10	20	30	15.2%
Important	58	55	113	57.1%
Not important	26	23	49	24.7%
No response	2	4	6	3.0%

(k) Determination:

	Employers	T.U.s	Total No.	%
Essential	24	32	56	28.3%
Important	58	49	107	54.0%
Not important	13	15	28	14.1%
No response	1	6	7	3.5%

(l) Other qualities:

	Employers	T.U.s	Total No.	%
Yes *	29	23	52	26.3%
No response	67	79	146	73.7%

	Total No.	%
Union Representative	100	50.5%
Management Representative	94	47.5%
No response	4	2.0%

Question 28: **If you are a Union Representative...**

(a): "What is the name of your Trade Union?"

	Total No.		Total No.
TGWU	21	NUFLAT	1
EEPTU	18	NUJ	1
GMB	20	BETA	1
NALGO	10	NGA	2
NUPE	1	AUT	1
MSF	9	SOGAT	1
ACTTS	1	IBOA	1
AEU	4	MU	2
BALPA	1	RCN	1
ISTC	3		

(b): What proportion of the workforce does your union have in membership in the establishment(s) covered by this particular arbitration?"

		Total No.
(i)	Under 10%	4
(ii)	10-24%	7
(iii)	25-49%	3
(iv)	50-74%	11
(v)	75-100%	45
(vi)	No response	28

Question 29: If you are a Management Representative...

(a): "In which industry is your main business?"

	Total No.		Total No.
Fishing	1	Paper, Printing & Publishing	7
Oil Processing	1	Rubber & Plastics	3
Water Supply	5	Other Manufacturing Industries	1
Metal Manufacture	4	Transport	2
Non Metal Minerals	2	Sea Transport	1
Chemical Industry	2	Banking & Finance	1
Manufacture of Other Metals	1	Business Services	1
Mechanical Engineering	3	Real Estate	1
Electronic Engineering	2	Public Administration	4
Manufacture of Motor Vehicles	1	Education	6
Instrument Engineering	1	Health Services	1
Food, Drink, Tobacco	7	Other Public Services	3
Textile Industry	3	Recreation and Cultural Services	5
Foot & Clothing	1	No response	30

(b): "Is your organisation a member of an employers federation?"

	Total No.
Yes	37
No	30
No response	31

(c): "How many people work in the establishment(s) covered by this particular arbitration?"

		Total No.
(i)	Under 20	5
(ii)	21-49	3
(iii)	50-99	10
(iv)	100-199	12
(v)	200-499	16
(vi)	500-999	6
(vii)	1000+	18
	No response	30

(d): "Is your organisation - Single plant ?"

"Is your organisation - Multi-plant ?"

	Total No.
Single Plant	29
Multi-Plant	40
No response	29

(e): "Which Trade Unions, if any, do you recognise in the establishment(s) covered by this particular arbitration?"

	Total No.		Total No.
TGWU	21	NUFLAT	1
EEPTU	18	NUJ	1
GMB	20	BETA	1
NALGO	10	NGA	2
NUPE	1	AUT	1
MSF	9	SOGAT	1
ACTTS	1	IBOA	1
AEU	4	MU	2
BALPA	1	RCN	1
ISTC	3		

(f): "What proportion of employees in that establishment(s) are union members?"

		Total No.
(ii)	Under 10%	1
(iii)	10-24%	2
(iv)	25-49%	6
(v)	50-74%	18
(vi)	75-100%	42
	No response	31

Question 30: **"Before this dispute have you personally been involved in any other dispute which went to ACAS arbitration?"**

All cases:

	Total No.	%
Yes	119	60.1%
No	72	36.4%
No response	7	3.5%

If YES "When was the last such time?"

Year	Total No.
Pre 1980	6
1981	1
1982	6
1983	1
1984	4
1985	10
1986	13
1987	31
1988	38
1989	3
Don't Know	3
No response	3

Question (to ESI cases only) **"How satisfied are you with reference to an independent person as the final stage of the industry's disciplinary procedure?"**

	Employers	T.U.s	Total No.	%
Not Satisfied *	6	3	9	16.7%
Satisfied *	14	15	29	53.7%
Very Satisfied *	4	10	14	25.9%
No response	1	1	2	3.6%

* Respondents were asked to give reasons for their answers. In general the trade union side were more satisfied with the arrangement. The main criticisms from the employers' perspective were that (a) there was a tendency for automatic reference to ACAS even when there was no hope of success; and (b) that the appellant still has the opportunity to take the case to an Industrial Tribunal. Sample comments are as follows:

1. Employer Side:

"Very Satisfied - The independence demonstrated and impartiality renders the ultimate verdict easier to live with. It is also much preferable to the expenditure in terms of management time and money to going to a Tribunal and more often than not saves going to this stage since both parties feel they have been dealt with fairly."

"Satisfied - The independent person stage has the merits of being relatively informal, cheap and avoids legalism."

"Not Satisfied - The independent person hearing should be the final stage in the disciplinary procedure. However, more and more dismissed employees are taking their cases to Industrial Tribunals. Boards are bound by IP decisions - an employee is not."

2. Trade Union Side:

"Very Satisfied - In my view it is the best system around, especially compared to (a) the industry's internal appeal system and (b) the Industrial Tribunal experience. (a) is not impartial and (b) is too legalistic."

"Satisfied - The very fact that both sides can identify an independent and hopefully impartial individual makes the decision more acceptable, particularly to the unsuccessful party."

"Not Satisfied - The truly impartial 'independent person' does not exist. In my experience they - in varying degrees - exhibit an inbuilt bias towards maintenance of the status quo."

Question (to ESI cases only)

"Please look back through Questions and identify below any aspects where your general experience was different from your experience in the most recent case."

		Total No.	%
(a)	The role of the independent person:		
	Comment Made	25	46.3%
	No response	29	53.7%
(b)	The characteristics of the independent person:		
	Comment Made	19	35.2%
	No response	35	64.8%
(c)	The independent person's report:		
	Comment Made	20	37.0%
	No response	34	63.0%
(d)	The implementation of the award:		
	Comment Made	19	35.2%
	No response	35	64.8%

FINAL COMMENTS

Respondents were invited to make additional comments regarding their personal experience with ACAS and in particular make any suggestions for possible improvements in its effectiveness.

All cases:

	Total No.	%
Comments Made *	81	40.9%
No response	117	59.1%

A wide range of comments were given and reference made to specific cases. In particular respondents commented on the efficient and professional service of ACAS. There were some criticisms of the time involved in the process and the employment of academics and lawyers as arbitrators. Again the type of case influenced the comments. Sample comments are as follows:

1. Employer Side (ESI):

"Experience gleaned from colleagues suggests that the results can be unpredictable in that ACAS independent persons do not always appear to be bound by accepted rules of procedure or standard tests of proof of guilt or innocence."

"After careful consideration I believe that the independent person appeal is not appropriate to a privatised industry. Employment law imposes a sufficiently high standard of reasonableness on large employers to act fairly. There is no right of appeal for Boards against an independent person's decision, no matter how perverse that decision may appear."

"A widening of the source of recruitment to include experienced managers or trade union officials (not involved with the industry) might improve the service."

"In terms of the final stage in the procedure, it has been my experience that the impartiality of the ACAS independent persons has provided the essential platform for resolving disciplinary matters usually to the satisfaction of both parties."

2. Trade Union Side (ESI)

"I think the system works quite well. In general the members have confidence in the impartiality of the arbitrators but I sense myself that a legalistic tendency seems to be appearing among some arbitrators who are influenced by Industrial Tribunal decisions in similar kinds of cases."

"Having been to two appeals with an independent chairman I found that I had nothing but praise for this type of appeal that gave both sides a fair hearing and in my experience gave an award to fit the evidence as submitted."

"Such an internal appeal structure has avoided cases going to Industrial Tribunals and because of the 'binding' nature of the award I think all sides accept the value of the machinery."

"Its effectiveness can be improved by the speeding up of holding the appeal and by the sending of the report."

3. Employer Side:

"Arbitrators should be prepared to give some detailed explanation as to how they arrived at their decision. The only aspect of my company's recent arbitration experience that I considered less than fully satisfactory was the brevity of the arbitrator's findings."

"I feel that the use of the same arbitrator can be very beneficial for obvious reasons."

"I consciously felt that the whole conduct of the exercise was courteous, thorough and fair."

"Problem of the ACAS arbitration is the over dependence on academics as arbitrators. Most people at plant level see the value of arbitration but are not happy with the academic/legal bias."

"Very impressed with the slick ACAS organisation."

4. Trade Union Side:

"I have generally found it to be extremely useful, the procedure fair and conduct courteous and helpful. My major criticism is that from the appearance of the problem to the final award can be a very long time."

"To some extent ACAS has become more pro-employer because of the obvious threat to their existence."

"Arbitrators should be drawn from a wider field rather than the predominance of university/college academics. Legality should not have a high profile in submissions and deliverations."

"In my experience ACAS have provided an essential service to industrial relations practitioners who find themselves unable to resolve difficulties via the normal procedure. Whilst I agree that arbitration/conciliation should only be necessary in exceptional circumstances, the mere fact that the safety valve exists is helpful. The standard of service provided by ACAS and its arbitrators is high and perfectly satisfactory. Comment on the quality of individual arbitrators would be invidious as I suspect the judgement would be a little coloured by the size of the award granted. In general I am more than satisfied with the impartiality shown."

WHERE RESPONDENTS WERE ASKED TO MAKE COMMENTS, THESE ARE OUTLINED IN DETAIL BELOW. ALSO FULL RESPONSES UNDER 'FINAL COMMENTS' ARE DETAILED.

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO Q 1[e]

How did this particular dispute come to be referred to ACAS arbitration?

Other [please specify]

1 Our negotiation procedure calls up pendulum arbitration on a failure to agree on the annual wage negotiation.

2 Job Evaluation Committee.

3 The option of going to ACAS is written into our grievance procedure.

4 Arbitration is written in to procedural agreements as last stage of negotiating procedure.

5 In accordance with Company/TU agreements.

6 Specified in our collective agreement.

7 Part of grading procedure.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO Q 1[e]

How did this particular dispute come to be referred to ACAS arbitration?

Other [please specify]

1 Voluntary last stage of grievance procedure.

2 An agreement exists which provides for this.

3 Part of Employer/TU Grievance procedure.

4 Last stage of dispute procedure reached.

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO Q 2[c]

Which of the following was the main subject of the dispute?

Other pay matters and conditions of employment not part of a general pay claim [eg questions over hours, holiday entitlement, shift or overtime premium payments, equal pay, bonus payments, piece work rates, sick pay, etc]

1 Application of premium rate.

2 Confirmation of management right to transfer shift workers within their shift rota.

3 Payments for the introduction of new technology.

4 Restructuring proposals following a management review, and interpretation of recognition agreement and definition of bargaining unit.

5 Interpretation of an agreement.

6 Job change payment.

7 Whether pay should be 6% now and and lower bonus potential via VA scheme, or 4.5% now and higher VA potential.

8 Shiftworkers holiday entitlement.

9 Interpretation of local agreement.

10 Compensation for loss of supplementary payment as a result of regrading.

11 Interpretation of agreements covering bank holiday working.

12 Bonus [pay rates).

13 Qualification for severance under agreement.

14 Right of management to change the personnel from shift to shift.

15 Unpaid time in split shifts.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO Q 2[c]

Which of the following was the main subject of the dispute?

Other payments and conditions of employment not part of a general pay claim [eg questions over hours, holiday entitlement, shift or overtime premium payments, equal pay, bonus payments, piece work rates, sick pay, etc]

1 Holidays for shift workers.

2 Eligibility for London weighting.

3 London Weighting.

4 Two hour maximum unpaid meal break.

5 Compensatory time off when sick during public holiday and vacation.

6 Shift Premium.

7 Shift Premium.

8 Shift premium.

9 Change of Shift.

10 Equal pay.

11 Overtime payments to senior staff.

12 Compensatory increase to monthly staff as a result of increase in hourly-paid holiday entitlement.

13 Payment for time recording.

14 Individual's grievance regarding entitlement under 1988/89 pay award.

SINGLE ARBITRATION - RESPONSES TO Q 2[f] AND Q 2[i]
[MANAGEMENT AND TRADE UNION]

Which of the following was the **main** subject of the dispute?

[a] 2[f]

Other trade union matters [eg disclosures of information for collective bargaining purposes, time off for trade union duties,etc).

Management:

1 Recognition of a particular shop steward.

Trade Union:

1 Efficiency bar on salary scale [single case).

[b] 2[i]

Other issues [please specify]

Management:

1 Retirement at 65 [as part of a response to a wage claim).

2 One employee was aggrieved in respect of the way a pay award had been interpreted in his particular case.

3 Interpretation of agreement.

Trade Union:

1 Entitlement to voluntary severance.

2 Recognition of shop stewards facilities.

SINGLE ARBITRATION - RESPONSES TO Q 3[h]
[MANAGEMENT AND TRADE UNION]

Which types of occupation were directly involved in the dispute?

Others [please specify]

Management:

1 All staff excluding managers.

2 PSV Drivers.

3 All employees, exception Management.

Trade Union:

1 Journalists.

2 Club Steward at Labour Club.

SINGLE ARBITRATION - RESPONSES TO Q 10[d]
[MANAGEMENT AND TRADE UNION]

How was the method of arbitration decided?

Other [please specify]

Management:

1 It was agreed between the parties after conciliation failed.

2 It was proposed by the MU as an alternative to strike action.

3 It was agreed after Conciliation and following industrial action.

Trade Union:

1 The company requested use of pendulum arbitration as per the procedure. The union put the request to the members who balloted to accept pendulum.

2 Outlined by arbiter himself at hearing, both parties agreed.

3 It needed strike action by the department to obtain arbitration.

4 It was arrived at after a number of meetings with the parties and ACAS.

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO Q 19[g]

The following questions concern the characteristics of the arbitrator in the proceedings

The arbitrator acted according to your expectations

1 Disallowed Industrial Tribunal case law and precedent.

2 We expected a different end result given the way the hearing was conducted.

3 I expected him to find for the company.

4 We felt that a more thorough knowledge of X's standard grading formula may have been useful. We felt the more fundamental issues were not given too much relevance at the hearing.

5 X is a voluntary organisation/charity. It is not fair to say the arbitrator did not understand the IR difficulties in this sector, but I thought this may be so. He took a legalistic approach - the issues on the agreement were clearer than the general aspects of the problem.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO Q 19 [g]

The following questions concern the characteristics of the arbitrator in the proceedings.

The arbitrator acted according to your expectations

1 Did not visit site [very important in this case). Too readily accepted manager's word. Allowed the company side wider discretion.

2 I expected a partly favourable outcome based on the strength of the individual case.

3 Partly Agree - As stated he decided one way or the other. I wish now we had allowed him to give recommendations as well but this was not asked for in my terms of reference.

4 Partly Agree - Moved away from pendulum at one stage and suggested, as we were very near, to look for acceptable compromise. Union agreed, company disagreed. I felt afterwards that we may have lost the 'short head' verdict on a 'judgment of Solomon' situation, ie the company appeared more convinced of their conviction than the union.

5 Agree, but note, however, that arbitrator gave too much weight in his decision to the company's ability to pay. This was not within his terms of reference and unless specifically asked should not take that into account.

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO Q 22[i] AND Q 22[ii]

How would you describe the contribution of the award to the settlement of the issues in dispute?

[i] So far, since the award was issued

[ii] In the longer term

1 [i] -Moderate; [ii] - Poor;

[b] The award was deficient;

Involved retention of a manager already with relationship problems with another union

2 [i] - Moderate; [ii] - Moderate;

[c] The workforce were not satisfied with the outcome and this has led to claims for payment for duties previously regarded as part of the normal conditions of employment.

3 [ii] - Moderate

[c] First time use of arbitration and union lost! Now it will be difficult to get their acceptance to try again.

4 [ii] - Moderate;

c] The award offered a solution to the problems but not the principle concerned.

5 [i] and [ii] - Moderate;

[c] Both parties felt that we should have been able to settle it ourselves and therefore ACAS was seen as useful but negative solution.

6 [ii] - Moderate;

[c] It postponed the argument between us on the question of all-round or percentage awards by declining to move from the recent all-round awards or percentage awards which the company wishes to end, but giving the reason only as 'past practice'.

7 [i] and [ii] - Moderate;

[c] Workforce disgruntled that they 'lost'.

8 [i] and [ii] - Poor

[a] and [c]

The X Conciliation Board asked for a response to a matter of dispute on the agreement. The award has been used by the union as a tool for a broader settlement.

9 [i] and [ii] - Moderate;

[c] This workplace is generally problematic.

10 [i] and [ii] - Moderate;

[b] Grading given with proviso of more responsibility and extra hours. X did want no regrading as the commitment to these two areas was ruled out. Award given without the provisos implemented.

11 [i] and [ii] - Moderate;

[c] Witnesses to the disciplinary hearing changed their story at the arbitration.

12 [i] and [ii] - Poor;

[c] Award will force company to restructure operations.

13 [i] and [ii] - Moderate

[b] The award did not cover all questions in the terms of reference.

14 [i] - Moderate; [ii] - Poor;

[b]

15 [ii] - Moderate;

[c] It establishes the Principle of one group of workers receiving more holiday entitlement.

16 [i] - Moderate; [ii] - Poor

[c] It settled the immediate dispute but has incorporated a structural problem into our pay scales.

17 [i] - Moderate; [ii] -Poor;

[c] The award makes past pay negotiation procedures impractical in future modified procedures may involve withdrawal of recognition of that union.

18 [i] and [ii] - Poor;

[b]

19 [ii] - Moderate;

[c] The question of retirement at 65 remains unresolved.

20 [i] and [ii] - Moderate;

[c] The union side was encouraged to insist on arbitration for many subsequent disagreements.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO Q 22[i] AND Q 22[ii]

How would you describe the contribution of the award to the settlement of the issues in dispute?

[i] So far, since the award was issued

[ii] In the longer term

1 [ii] - Moderate;

[a] Total package too black and white; and

[c] Because the loss of the decision may influence against the choice of pendulum in the future.

2 [i] and [ii] - Moderate;

[a]

3 [ii] Moderate;

[c] Because company found itself later unable to fund the award.

4 [i] and [ii] - Poor;

[c] Management undermined the award.

5 [i] and [ii] - Poor;

[c] The arbitrator gave weight to the ability to pay not the substance merits of the case thereby undermining any future reference. Because any award on the grounds of ability to pay can be overridden.

6 [i] - Poor;

[b] and [c] - It has given scope to management to deal with this type of issue in a less detailed and fair manner.

7 [i] and [ii] - Moderate;

[b] The increase was not large enough.

8 [i] - Moderate;

[c]

9 [i] - Moderate;

[c] Employer has failed to settle - matter referred back to Tribunal and High Court for enforcement.

10 [ii] - Moderate;

[a]

11 [i] - Poor; [ii] - Moderate;

[c] Management's oral evidence was deceptive and the arbitrator was bound to believe them.

12 [i] - Moderate; [ii] - Poor

[c] The Company has given notice of intent to tear the agreement up anyway on the grounds that the balance of power is theirs and so who needs arbitration?

13 [i] - Moderate; [ii] - Poor;

[c] Economic dictates and inflation wiped most of it away.

14 [i] and [ii] - Moderate;

[b]

15 [i] and [ii] - Poor;

[b] Again not the fault of the arbitrator but the agreement, especially the first offer and the first request.

16 [i] and [ii] - Moderate;

[c] Arbitration gives a 'result' - it doesn't necessarily solve the problem - a 'dispute' still lingers on.

17 [i] and [ii] - Poor;

[a]

18 [i] and [ii] - Moderate;

[a]

19 [i] and [ii] - Moderate;

[a]

20 [i] - Moderate;

[b]

21 [ii] - Moderate;

[b] Possibility that individual may continue to look for means of redress.

22 [i] and [ii] - Poor;

[c] The Employer has not stood by the award.

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO Q 23

Would you use ACAS arbitration again if a similar dispute arose in the future?

1 No- Insufficient consideration to peripheral matters.

2 No - Insufficient understanding of background to the dispute.

3 No - Hopefully our contracts will be altered to use the relevant council for local government employees who have all relevant details of work in this area, ie 'Purple Book'.

4 No - The company believes that the binding arbitration clause in the procedure has a 'chilling' effect on the negotiations, which have resulted in arbitration in two of the last three years' negotiations. The company believes this is unacceptable and defeats the object of having such a clause.

5 No - Inconsistency of witnesses not under oath, with limited opportunity to cross-examine.

6 No - There was and remains a feeling that an arbitrator is inclined to be sympathetic to and find for the underdog [ie employee] whatever the long-term ramifications of the problem are for the employer.

7 No - Logic of a ward was wrong, want to be our own master.

8 No - In general industrial relation terms emphasise 'winner' v. 'loser' relationship. Also union 'side' have nothing to lose in that they don't have to 'give' anything even if arbitration goes against them.

9 Not necessarily - the finding is going to make future negotiations more difficult.

10 Would depend on the circumstances of the case.

11 Yes, because I have to according to our procedure, but otherwise I wouldn't.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO Q 23

Would you use ACAS again if a similar dispute arose in the future?

1 No [No reasons given).

2 No - For the reasons outlined above, the merits of the case are irrelevant if arbitrators take on face value that the company is unable to afford an award.

3 No - We renegotiated the part of the agreement which gave rise to the problem in the first place.

4 Possibly - We renegotiated the part of the agreement which gave rise to the problem in the first place.

4 Possibly, if we could not get the necessary industrial action.

5 Not sure.

6 Maybe.

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO Q 26[i]

In your view, which of the following qualities are important for effective arbitration?

Other Qualities:

1 Common Sense!

2 Good presentation of self, good interpersonal skills, effective listener, firmness in controlling proceedings, ie good 'chair skills'.

3 The ability to communicate effectively at all levels.

4 "Perceived Justice" - and that will depend on arbitrator's ability to sense and and respond to varying organisational cultures.

5 Ability to sum up situation as he/she sees it as the time of the arbitration without necessarily making a decision. This allows the parties to ensure that all their points have been understood.

6 To grasp the underlying aspects of the arbitration from the facts presented.

7 Ability to deal with often heated exchanges between parties.

8 Patience and good listener.

9 Sense of common justice and fairness.

10 Understanding of the consequences of arbitration decisions.

11 A good background knowledge of how organisation runs - a visit should be a requirement to see firm or organisation on a normal working day.

12 Some experience in the type of organisation.

13 Ability to earn confidence and respect.

14 Ability to recognise and state common ground at arbitration.

15 Trustworthiness.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO Q 26[i]

In your views, which of the following qualities are important for effective arbitration?

Other Qualities:

1 Disciplined mind of the academic/lawyer type.

2 Ability to seek the right questions.

3 Be street wise and have a basic understanding of fairness.

4 A free hand to compromise.

5 A cordial approach to both parties which I have found to be so in all cases in which I have participated.

6 Ability to keep parties to the point at issue.

7 Patient and tolerant.

8 Patience.

9 Patience.

10 Patience.

11 Patience.

12 Patience.

SINGLE ARBITRATION RESPONSES - MISCELLANEOUS
[MANAGEMENT AND TRADE UNION]

1 3[h] - Journalists. [M]

2 7[a] - Excluded. [M]

3 9 - All can apply - much depends upon the personalities involved, and from the employers point of view whether there would be a significant knock-on effect in conceding an upgrading. [M]

4 17 - We had been told we could choose 1 of 3 - this did not happen. [M]

5 Q18 - I felt he was insufficiently well briefed on the sector of employment involved. He did not seem to have a firm grasp of the background to the issue, as it related to the way in which our members worked. [TU]

6 Q18 - The Company threatened to tear up the agreement if the arbitrator's award favoured the unions claim. I believe this affected the arbitrator. [TU]

7 Q24[k] - It certainly avoided a dispute in this case as the union members had voted 7-1 for industrial action by secret ballot and the Company were talking 'No Surrender', even cancelling move to a new site, moving out of area if dispute occurred. [M]

8 Q25[d] - No experience of this - we would not allow an external party to take decisions which could affect our commercial viability. [M]

SINGLE ARBITRATION - MANAGEMENT RESPONSES TO SECTION D

FINAL COMMENTS

1 In a matter of discipline leading to dismissal which this case was, the threat of industrial action by the union takes the matter away from the Industrial Tribunals into arbitration. The guidelines for arbitration are not established by legal precedent and can therefore arbitrate only on the dispute not the cause of the dispute.

2 Very satisfied with service given by ACAS in both conciliation and arbitration.

3 There was an undue delay between the conciliation hearing on 9.11.87 and the arbitration hearing on 3.2.88.

4 Problem of the ACAS arbitration is the over-dependence on academics as arbitrators. ACAS are aware that far too many of their arbitrators do not have industrial or commercial experience and would like to present employers with a choice that includes individuals with sound industrial, commercial experience. However they feel that employers would not accept arbitrators with union backgrounds and unions would not accept individuals with management backgrounds. In my opinion ACAS should test employers' unions' reaction and train suitably experienced people from outside of the academic/legal field.

Most people at plant level see the value or arbitration but are not happy with the academic/legal bias.

5 The hearing was very informal which caused a great deal of argument directly between the two parties. This led to a fairly confused situation at times. The arbitrator was clearly seeking a compromise from the start as a result he did not tackle the principle at stake. He did not explain fully and logically the reason for his award.

6 I was very impressed with the work of the arbitrator in our recent case, he handled a difficult situation extremely well, and his decision was acceptable to both parties.

Additionally, because our dispute was one which had dragged on for as long time, the arbitrator, at the request of both parties, provided an extremely quick decision, which meant we were able to get the workforce settled back into normal working very quickly.

In all an extremely good and efficient service, which I hope I won't call on again for some time to come.

7 Since the mid 1970s I have been directly involved in about 20 differences which have been settled by arbitration by ACAS and have the highest regard for the contribution towards good industrial relations, ie if it is laid down in the formal procedure as a means of avoiding industrial action.

Whilst both parties have always accepted the arbitrator's Award I would have more confidence in the arbitrator's ability to make the "correct" decision if he was not always an "academic".

8 Very impressed with the slick ACAS organisation.

9 Selection of chairman/arbitration officer should have industrial experience at senior level.

When making an extreme award of whatever nature this should be supported by a detailed report as to the reason for the decision.

10 Delighted with 'local' officer's assistance - would have liked the whole procedure to have been handled by him. The sudden dislocation between conciliation [ie 'local'] and arbitration [ie national] was somewhat worrying. However, the system, as is, functions adequately.

11 Please excuse the delays in responding. This questionnaire has been completed in respect of the most recent arbitration, not that at Blackpool Airport to which your original questionnaire referred. The second arbitration was far more difficult because it required a thorough understanding of a job evaluation scheme. The arbitrator did not, to my belief, fully grasp the TU or management understanding of its application.

12 Ours was only a minor dispute, which was handled extremely well, with as much attention to detail a if it had been a major issue.

13 ACAS arbitration is generally a very useful vehicle but should only be used when normal discussions have reached a stalemate. We have found it more useful than conciliation as we would make every effort to reach a mutually acceptable compromise within our normal procedures [the role that conciliation would try to repeat).

I have no important suggestions concerning improvements.

14 In general ACAS is extremely useful in resolving our grading disputes, but it is certainly valuable to have consistency by using the same arbitrator wherever possible, in order that he/she is familiar with the complexities of the scheme.

15 I have only dealt with one arbitration hearing and therefore can only comment on this.

We felt that the hearing was undertaken very efficiently and professionally but felt that the arbitrator had very little knowledge of how a students union works. Student unions are a very different organisation to say those of industrial management companies. Often staff have to undertake tasks that are over and above their job description. At this hearing we felt that the arbitrator took little account of the effect a Grade 3 appointment in this area would have on our staffing structure.

The outcome of the hearing was that the arbitrator felt that the job description of the person applying for a re-grading had increased to a certain extent but no more than any other member of our staff. Staff in our organisation have to be extremely flexible and this is the ground on which our case was presented.

We have however awarded a scale 3 to this employee, but very little of the other recommendations and provisos attached to this award by your arbitrator have been followed. We did not want a commitment from her to work longer hours, more weeks or be a senior person in the office and this was the way your arbitrator felt we should move.

This is the main reason I answered some of the questions, in that a visit to the organisation may be of significant importance to an arbitrator in this case I felt that she had very little idea of how most students unions run their organisations.

I hope these comments are of use to you. Overall, however, from the ACAS point of view, the hearing was to our satisfaction and only one or two points already made seem to be relevant. We would in future, however,try and alter our contracts so that staff can go through the local

government committee as we feel that they at least have the knowledge of the 'Purple Book' requirements relevant to polytechnics and colleges and local government organisations.

16 In general I would be reluctant to use arbitration again in the disciplinary area.

I would however use and will use it again in single issue areas of collective bargaining.

17 There appears to be a view that both sides are reluctant to go to binding arbitration since they feel that they should be capable of resolving disputes through their own joint procedures. In view of this, perhaps more emphasis could be given to the 'conciliation' service offered by ACAS. Publicity tends to attach to the 'arbitration' role.

In general, my experience of ACAS is that they are both effective and efficient when the need to consult or involve them arises. ACAS does serve a useful purpose.

18 Arbitrators should be prepared to give some detailed explanation as to how they arrived at their decision. The only aspect of my company's recent arbitration experience that I considered less than fully satisfactory was the brevity of the arbitrator's findings.

19 Ref 8[b] In our view the conciliator did not fully attempt to resolve the dispute.

[b] Ref 24[c] - In the content of this question we did not know what was meant by the term 'stronger party'.

[c] Ref 26[h] - We believe previous experience of arbitration is essential, however, we would be interested to know how arbitrators gain experience.

20 [a] I was pleased with our most recent, and only experience of arbitration which was professionally handled and we would be pleased to go through the process again.

[b] I am concerned that the union may feel in future that this is an easier way to resolve difficulties and may be used regularly.

[c] The next negotiations this coming July/August should prove interesting.

21 The situation dealt with at this company concerned an employee who had been caught smoking in a paper storage warehouse which was clearly defined as a non-smoking area. The company has had in the past few years two serious fires [not due to smoking] and the smoking allowed on the factory floor is limited to designated smoking areas.

In view of the seriousness of the offence the company, in line with a warning published several years ago, dismissed the employee for a breach of rules. After assessing the facts the arbitrator agreed that the employee had been smoking in a dangerous area and had breached company safety rules, but on a technicality of the warning notice having been removed from the notice board, changed the decision to 2 weeks' suspension.

In the report, the company felt that the arbitrator had shown some sympathy for the employee at the expense of the company to be able to have firm control over smoking in the workplace. This bias towards the 'underdog' and the constant desire to compromise [or 'fudge'] ignores the basic rights or wrongs of an issue. Quite cynically our employees have been told that if they wish to smoke anywhere in the factory they can do so at the inconvenience of two weeks unpaid leave.

22 I feel that the use of the same arbitrator can be very beneficial for obvious reasons.

23 [a] The arbitration service is essential.

[b] It must be independent and be seen as such by the parties.

[c] The arbitrator must understand industrial relations practices and procedures.

24 I consciously felt that the whole conduct of the exercise was courteous, thorough and fair.

Most importantly, I should say that that was my spoken impression **before** declaration of the award!, ie the experience inspired a feeling of confidence. It promoted a promise of 'justice' - whichever way the arbitrator's views ultimately fell.

25 As I have said I was asked to act in this dispute because I do not act for the union. I am, as it happens, a member [very inactive] of MSF. Arbitration was suggested by both parties following their failure to reach agreement. There was a threat of industrial action principally since the employee's length of employment would not have enabled him to apply to an Industrial Tribunal.

SINGLE ARBITRATION - TRADE UNION RESPONSES TO SECTION D

FINAL COMMENTS

1 The decision to take the case in question to arbitration was taken by my members against my advice. Being men of honour they will abide by the decision reached. Although the pill is now well swallowed, the apprehension of other changes to come under the decision is still there, although both sides seem to be working at keeping relationships good.

Of the decision, I am sorry to say that I had a good idea that any professional arbiter would have come down on the employer's side on the quasi-legalistic basis of managements's right to manage'. Had that view not been constantly challenged by trade unions over the past two centuries, industrial relations would most probably never have changed since 1788. Too often in arbitration or in industrial relations the trite prevalent views are trotted out as virtues. Disputes are a normal part of industrial relations and whilst I believe that the ACAS role of conciliation is beneficial that of arbitration only allows the weaker party an honourable way"off the hook". Otherwise, as we see by the actions of this present government, power prevails as it naturally will.

2 Generally satisfied with current practices and standards.

3 In the case of pay awards where the parties are close in their final positions, pendulum is probably as good as any other way to resolve the pay dispute.

The arbitrator should have the opportunity of deflecting away from strict pendulum before the formal meeting, perhaps to suggest a compromise, if he feels that the written submissions are very close in merit.

It is not a good idea to get cold feet in the middle of the exercise and invite the parties to compromise. The party who agrees may feel they have weakened their case. Pendulum must voluntary as the employer will not be pressurised into making realistic attempts to solve the problem after several usages.

Voluntary pendulum is a handy 'escape lane' after procedure is exhausted and an industrial action ballot is positive. Members can have a rethink on their action without losing face.

I agree with Dr X that future terms of reference should examine the case item by item rather than a package. Where one party gets nothing, it could discourage use of pendulum in future.

4 The appointment of the senior ACAS official is a political appointment which will always mean a wary eye towards the masters when making an award. I always remember a remark made to me by a very senior arbitrator. "Right is on your side but if I award in your favour I will be removed from this job." Having said that I believe they do the best they can.

5 All right as it is.

6 There are two general problems which relate to conciliation officers which I have extensive experience. Although generally the conciliation officers perform well, I have experienced that often they accept that the problems which are referred to them are at an impasse and they spend

little time trying to mediate between the parties. Also I have had experience of a conciliation officer advising management independently of the union that the terms of reference already agreed should be altered because the terms of reference could prejudice the arbitration; I consider this action less than impartial.

However, bearing in mind the general performance of ACAS conciliation officers is acceptable, perhaps the recruitment and monitoring of performance of officers should be considered.

Additionally I am concerned that when complaints are made about officers they should be properly investigated which is not the response I received when complaining to ACAS about the performance of a conciliation officer.

7 I would just like to say that I found the service of ACAS was very good and reasonably fair, but thought there was a slight move to the company's plead. I guess this is because we did not improve on the company's offer.

8 In all previous arbitration cases with X Ltd the company has attempted to restrict the scope of the investigation and to control proceedings. Previous arbitrators have made it clear that the restriction would hamper a fair review of the case. The last arbitrator accepted most of the company's limitations. The arbitration was conducted in a manner similar to an Industrial Tribunal which acted against those less able to deal with formal situations. It should be mandatory for all arbitrations to be held on independent territory. They should be conducted in a less formal manner but should prevent interruptions. It would help if arbitrators familiarised themselves with the sites, the company and the company/union relationships.

Arbitrators should be drawn from a wider field rather than the predominance of university/college academics. Legality should not have a high profile in submissions and deliberations.

9 In the previous arbitration in 1987, the arbitrator came down strongly in favour of the trade union claim which added to his very limited explanation of his reasons, a degree of resentment was evident on the management side which caused some minor problems in the following months. However, Professor X's handling of the 1988 arbitration seems to have corrected the situation.

10 I have generally found it to be extremely useful, the procedure fair and conduct courteous and helpful. My major criticism is that from the appearance of the problem to the final award can be a very long time.

11 Attempts should be made to arrange arbitration more quickly.

12 In my experience ACAS have provided an essential service to industrial relations practitioners who find themselves unable to resolve difficulties via the normal procedure. Whilst I agree that arbitration/conciliation should only be necessary in exceptional circumstances, the mere fact that the safety valve exists is helpful.

The standard of service provided by ACAS and its arbitrators is high and perfectly satisfactory.

Comment on the quality of individual arbitrators would be invidious as I suspect the judgment would be a little coloured by the size of the award granted. In general I am more than satisfied with impartiality shown.

13 At the time of the arbitration I was a relatively new full-time official of the trade union, although I had lengthy experience as a lay member activist. I had no previous experience in terms of using ACAS arbitration and quite frankly most of my colleagues to whom I had spoken to previously about arbitration were not very keen on its use, although the majority did admit that it could be useful at times.

In terms of the particular case that was referred to independent arbitration I was totally convinced that the employer was in the wrong, although I was well aware that our member was not totally without blame. Our member had been dismissed and in my opinion was being used by the management as an example to the rest of the workforce and as such was being penalised more severely than the alleged offence warranted.

On the basis that the employer was willing to go to arbitration rather than face potential industrial action, I was willing to give it a try; and bearing in mind that the employer was blatantly in the wrong, I had every confidence that the arbitrator would find in our favour.

As far as this particular arbitration is concerned and bearing in mind that this has been my only experience of arbitration to date, I was well satisfied with the outcome and cannot fault it in any way. On that basis I am unable to suggest any possible improvements.

14 The major problem with arbitration is a basic simple fact that from a TU point of view failure to gain satisfaction tends to discredit the system and creates resistance to the use of arbitration in the future. There is, therefore, a marked reluctance to use arbitration except in extreme circumstances.

15 We have used ACAS not only in respect of failures to agree at grading panels but also in local disputes where conciliation is needed. We have always found the service very valuable. We have had four different personnel from ACAS over the last 10 years, and we have always been satisfied even though the decision has not always been in our favour. Carry on the good work.

16 On the whole I would say that my experience of ACAS arbitration has been good and that it certainly can be an important mechanism in resolving industrial problems. However its time is probably already over. The present government and the current economic climate has meant that employers see less relevance in going to ACAS in the first place. Employers clearly believe that they have all the weapons that they need in order to fully support their contention that "management will manage and we don't need anybody else making our decisions for us - be it ACAS or unions."

To some extent ACAS has become more pro-employer because of this obvious threat to their existence.

At the moment, the jury is out as to whether the trade unions will survive - ACAS's future is dependent on that.

17 We are submitting our annual wage claim to day [21.2.89] and already we have heard that management are already geared to go to arbitration, owing to a financial revenue deficit.

This management see arbitration as a simple exercise. We get what we may consider a 'fair' award and all we get in return is departmental budget cuts to 'off-load' the difference between their offer and the ACAS award, so in real terms its very hard to 'WIN' anything really irrespective of the ACAS decision, but as a Trade Unionist I find the services of ACAS highly commendable when in the situation of arbitration.

18 At arbitration the use of an Arab interpreter is sometimes called for. This causes some delays due to the fact that it would appear that it is very difficult to obtain the services of this type of person. I would, therefore, suggest for the future that a list of interpreters be kept within the ACAS offices, in order to prevent further delays, should these interpreters be required.

19 My personal view of our experience with last year's arbitration encounter is that it is a waste of time with the rule of management, ie first offer and first claim. It leaves the arbitrator no room

to carry out a fair conclusion. We have asked management to change this rule but they have stated "no way".

20 If possible, occasionally visit factories to meet shop stewards for general discussion problems which sometimes appear to be recurring and frustrating and though not in themselves causing industrial action, very often build up to resentment and a deterioration in good industrial relations.

21 I believe arbitration is only of value in resolving small disputes, ie gradings of individuals. In more collective cases I would not recommend to members the use of arbitration - it diffuses anger, calms down the dispute and allows the management time to undermine what may be a strong TU position.

My experience with arbitration has been on grading cases only. In the industries with which I deal there are usually ways of resolving the problem before the final stage. The only case where arbitration could have been used on a collective case finally ended up as a 3 week strike [successful!) over the regrading of 35 members. In that case arbitration would not have achieved the success that the strike did!

22 I was personally very happy and satisfied with ACAS and all its procedures and of course its results.

23 Since the establishment of ACAS I have used both the conciliation and arbitration service on a number of occasions. It has provided an opportunity of resolving disputes when no other course was available and also gave additional time to both sides to reflect and evaluate the situation.

The 'face saving' involved by the introduction of ACAS should never be underestimated.

24 Pendulum arbitration is too much for TU's to swallow. Industrial relations contains too many grey areas for it to be effective in the long-term.

Arbitrators must be "free-thinkers" and wherever possible terms of reference should be drawn up in such a way as to allow for originality on the arbitrator's part to show through - new and sometimes novel answers are required to solve some old deep-seated problems.

25 A brief background to our dispute - I am a member of a eight man job evaluation committee, who after many hours of discussion were split 50-50 regarding a grade. We called in ACAS who were quite happy to help us, they informed us they would have to get union agreement first, this was done but the union put one restriction in our way, whoever put the case for up-grading had to be a union member. As I was the only trade union member in my group of four, I had no other choice but to put the case for upgrading. My criticism is that within my group there were people more qualified to present the case. I think this restriction imposed by the union was detrimental to the case for upgrading.

26 It will be obvious that my experience of ACAS arbitration is limited. This is because the public services in which NALGO mainly organises its members has its own machinery for settling disputes. I have been involved in conciliation with ACAS usually in disciplinary matters.

27 The service which ACAS can provide has now been limited by interference from government and because of the anti-trade union legislation employers can reject the use of ACAS arbitrators while willing to accept the conciliator's role. The independence of the original service has been undermined as has the authority which the service commanded.

28 Both the role of ACAS and the quality of the arbitrator in this and subsequent arbitration could not have been bettered. The same applies to the organisation and style of the arbitration proceedings.

29 Without arbitration as a part of any settlement of differences procedure then there will be a much increased level of industrial action. I consider that the continued involvement of ACAS is essential and in everyone's interest. Our own management are now seeking to remove, from our agreement, the ability to refer unilaterally any dispute to ACAS. The only reason is that their managerial prerogative is eroded and the TU position weakened.

30 By its nature arbitration tends to the status quo. It is therefore, not helpful in new areas of claim or organisation. This is where more disputes are happening: a too rigid view of comparators and terms of reference prevents the use of arbitration in areas where it could be most helpful.

31 The ability to enforce their decision legally as in the case of X Club where mon member has still not **been** paid his award.

32 Impressed with the efficiency and professionalism of ACAS staff, and with the performance of the arbitrator both at the hearing and his written award.

ACAS ARBITRATION SURVEY - QUESTIONNAIRE RESULTS

Boards Of Arbitration - Management and Trade Union Responses

A Management:

1

3 [h] - Warehouseman

11 [c] - Single arbitrator failed

21 [a] - To ensure that all relevant points are discussed.

[b] - Avoids one man decision.

[c] - Any inequality in strength of character or direct knowledge of particular industry could influence the decision.

25 - No. Would prefer to use Industrial Tribunal.

2

2 [i] - Change in managerial organisation

[h] - Nurses

11 [c] - To enable there to be person[s] with specialised knowledge.

21 [a] - To assist in extracting relevant factual information and to contribute specialised knowledge to the forming of the judgement.

[b] - They give breadth of experience and perspective.

[c] - It takes longer. There is a risk of partiality when the members are nominated by one of the parties.

25 - Yes.

D - The most significant failure in the case in question was lack of speed, both in setting up the dates for hearings and in sending out the final report, which took several weeks longer than promised.

B Trade Union:

3

3 [h] - Drivers and warehousemen

21 [a] - To assist the chairman to form a view based on their industrial knowledge and to ensure that all relevant points are explored.

[b] - At least one of them should have an understanding of your point of view even if he/she does not agree with you.

[c] - Chairman has no-one to discuss the case with unless there are side members. Debate ensures proper consideration of the issues.

25 - Yes

D - Frequently valuable for ACAS as an 'outsider' to impose a solution which parties would not be able to concede easily. Particularly important where management integrity is challenged and senior managers would naturally tend to give loyal support to colleague under challenge.

4
2 [i] - To determine if a member of NUPE or a member of the REN should be appointed to a particular post. Management supported the REN.

11 [c] - NUPE/REN? own nominated members

21 [a] - To provide a view on the particular trade/profession.

[b] knowledge of profession/trade.

[c] unless appointed by both parties may not have relevant knowledge.

25 - Yes.

5
2 [i] - Failure to take up new appointment

25 - Yes

ES1 Cases - Responses to Q1 [f]

The independent person conducted the hearing to your satisfaction

1 Disagree - The independent person allowed the TU side assessor to give his views - at length - on the case in the hearing, I consider this was outside the assessor's role. The independent person's control of the hearing was in some respects too tight in my opinion. There were two presenters of the Board's case, myself and the line manager. Although the latter was present throughout, he was only allowed to contribute as a witness - this was unnecessarily restrictive. [M]

2 Appeared over formal in disallowing evidence. [M]

3 He allowed the trade union assessor to advocate and to introduce information and comments not relevant to the case. [M]

1 He allowed adjournment for employers to prepare case on 'fresh' evidence [1 week]. [TU]

2 Wanted to speed up hearing after lunch - cut short questioning of Board representatives. [TU]

ES1 Cases - Responses to Q 2[g]

The independent person acted according to your expectations

1 Disagree - The chairman had very definite ideas about what evidence he wanted to view and allowed no deviation. This worked well with the case concerned but could have been dangerous in other circumstances. [M]

2 Disagree - Gave undue weight - in my view - to the fact that the person's future pension value [as well as present earnings] would be reduced, yet agreed that the misconduct had occurred as stated and that current penalty was appropriate. [M]

3 Partly Agree - The reason for the answer to [g] above is that the independent person pursued a line of questioning which in my opinion dealt with the side issues of the case. Having said this he did in the final analysis agree with our conclusion. [M]

4 Disagree - as in [f] above. This is the first independent body of perhaps twelve I have been involved in where the co-presenters' role has been limited. [M]

5 Disagree - Did not explain to the appellant how the proceedings would be handled. [M]

1 Disagree - hoped for impartiality. [TU]

ES1 Cases - Management Responses to Q 5

Did any difficulties arise in the implementation of the award?

1 Yes - The hearing chaired by Professor X was particularly difficult, twice new evidence was presented before the hearing was due to commence and on the first occasion this led to a two week adjournment. On the second occasion, ten minutes before the hearing began, the Board side was presented with a statutory declaration from the appellant's solicitor. In dealing with these unusual procedural difficulties, I consider that Professor X acted in an exemplary manner and did not allow himself to be intimidated by the formal nature of the new evidence which was submitted.

The hearing itself was unusual in that the facts as presented represented completely contrary views of what actually happened. The outcome therefore depended upon the veracity of the evidence given by the individuals elicited through skillful cross-questioning on the part of Professor X and the two assessors. Several untruths were posed which called into question the honesty of the appellant involved in the hearing. Therefore some of the flavour of the hearing and the reasons that led Professor X to his judgment are probably not wholly reflected in the independent person's report.

2 Yes - It was difficult to implement the proposal that the individual be given work at a certain grade since only one post was available within the jurisdiction of the manager concerned and other managers would be more than reluctant to take on someone who had been subject to disciplinary proceedings into a post which would provide a promotional route for another member of staff.

3 Yes - The penalty of dismissal was varied to transfer/downgrading. The downgrading takes effect retrospectively to the date of dismissal, meaning that the reduced salary is also paid from that date. This point was questioned by the full-time trade union officer but confirmed by the Electricity Council and [by telephone] the independent person.

4 Yes - The penalty quashed a downgrading and substituted one week's suspension without pay. Due to the length of time between the original decision and the ACAS result the loss of pay due to downgrading was substantially more than 1 week's pay and so we actually paid money back to the offender and so it was not perceived by others that any penalty had been suffered. This was despite the clear agreement by the independent person that serious misconduct had occurred.

5 Yes - The appellant had obtained another job almost immediately after his dismissal. The problem of 'double earnings' had to be resolved relative to the period to the date of reinstatement.

6 Yes - The ambiguous nature of the award gave scope for the TU side to dispute the Board's interpretation of it.

7 Yes - Personal difficulties with staff in returning employee to same location - needed by agreement later to transfer to another site.

ACAS ARBITRATION SURVEY - QUESTIONNAIRE RESULTS

ES1 Cases - Trade Union Responses to Q 5

Did any difficulties arise in the implementation of the award?

1 Yes - Whilst the award said Mr X should be transferred to another post at the same or another location the Board interpreted this as a downgrading by some 10 or so incremental points [value approximately £2,000] plus transfer to a 'remote' site not too accessible by Mr X, further adding to his financial loss. I have called upon the Electricity Council to seek guidance on this interpretation from Professor Y.

2 Yes - The difficulty may arise in implementing that part of the award which calls for a 'review of the situation after 12 months'.

3 Yes - Member lost job.

4 Yes - Only insofar as the award which concerned a lowering of status and salary was judged after further reference to be retrospective to the point of the original dismissal.

5 Yes the appellant did not immediately return to his employment due to his own lethargy.

ACAS ARBITRATION SURVEY - QUESTIONNAIRE RESULTS

ES1 Cases - Management response to Q 7 [1,2,4 & 5] re General Experience

1

Q1 Over the years I have been involved in a number of cases. The majority of independent persons have decided cases on their merits. I have noticed however in more recent times a tendency to try to arbitrate by changing the penalty, not because a change is warranted, but more to give something to both parties - see note in relation to 8 [h].

Q2 With one or two exceptions, the answers to question [2] give a fair reflection of my experience. As virtually all are academics [which gives them the independence and clarity of thought] they tend to be somewhat removed from industrial and commercial life.

Q4 In general well written and many occasions scant reasons given for decision.

Q5 In general straightforward. A few cases where it has been necessary to seek clarification following receipt.

2

Q1 My general experience does not differ from this latest case, in respect of the attributes listed for an independent person. In other words, they were present.

Q2 Were, in this latest case, very similar to those of other IPs to whom I have presented cases - with the exception of the previous independent person. He did not, in my view, demonstrate in his judgement the required objectivity, or alternatively, so misconstrued the facts as to vitiate his conclusions.

Q4 Was not unexpected in the latest case and satisfied the criteria I look for in such reports. This has been my general experience except for the previous case in which I was involved, where the outcome resulted in the reinstatement of a dismissed employee, who was, in our judgement, manifestly guilty of the offence for which he was dismissed.

Q5 Did not cause any difficulty in this most recent case, which has been our experience, generally. However, the implementation of the award in the previous case referred to in Q4 did nothing to help reinforce the message we were attempting to convey to our workforce, about the seriousness and potential consequences for those staff committing the particular disciplinary offence, for which the offender was dismissed.

3

Q1 It is par for the course to have trade union assessors who feel it incumbent on them to refute or disprove the employer's case. This is not their role and one expects the arbiter to enforce his control on all parties.

Q2 In general I would agree that the characteristics outlined in 2[a] to 2[g] are observed.

Q4 Normally clear, concise and logical.

Q5 There is a tendency to seek a compromise rather than decide if a penalty is 'fair' in terms of the employer's rules and the law.

4

Q1 In my experience, for the most part, independent persons have conducted hearings most correctly.

Q2 As above, I could not fault the handling of hearings, but my view is that independent persons should have had recent experience in industry or commerce. A major criticism I have is that invariably the independent person is either an academic or a lawyer. This seems wrong in that this stage in the procedure precedes appeal to an Industrial Tribunal [dismissal cases only].

Q4 Reports are adequate in content although they always take far too long to appear [typically 3 weeks]. It is in all parties interests for the result of a hearing to be revealed more quickly so that it can be implemented speedily.

Q5 Generally no problem - although see 5.

5

As Above Response for different case

6

Q1 In an attempt to keep matters as informal as possible, there seems to be a growing tendency to conduct proceedings in a way which makes direct questioning of the appellant extremely difficult. In some recent cases, the appellant has not actually spoken at all. Surely the behaviour, demeanour and truthfulness of the appellant should be factors which an independent person should take into account?

Q2 No differences of any consequence.

Q4 The report in the latest case was excellent but with one crucial proviso. The independent person gave a list of the considerations on which he based his decision but he did not say how much weight he gave to each of the points he raised before arriving at his decision. Some sort of rationale on how he judged the considerations would have been helpful.

Q5 The questioning of the implementation of the award in this case was due to a misunderstanding by the trade union officer rather than any ambiguity in the independent person's decision.

7

Q1 The independent person allowed the appellants to lead and only allowed me to reply to appellants' point, ie I could not emphasise points not raised by appellants because they were unfavourable to them.

Q2 No change.

Q4 Only reasonably adequate.

Q5 Very awkward. Downgraded a craftsman to a lower grade yet indicated that he should continue with his existing craft employment.

8

Q1 I believe there is a tendency in some cases for the independent person to see his role as that of an arbitrator. This leads the independent person to seek a compromise solution rather than sticking to what I believe is his formal remit, ie to assess whether management's decision was reasonable in the light of the circumstances and the requirements of the law. It should be stressed that it is not the independent person's job to seek/to get a solution that is acceptable to all sides.

Q2 Occasionally an impression is left that the independent person is too academically biased and does not have a proper understanding of the difficulties of managers in industry enforcing disciplinary procedures.9

Q1 I have dealt with 2 cases in 1988 [including Mr X]. On both occasions the role was made very clear as was the structure of the actual hearing. However, on both occasions I did not feel there was sufficient opportunity to question the appellant - only the appellant's representatives.

9

Q1 I have dealt with 2 cases in 1988 [including Mr X]. On both occassions the role was made very clear as was the structure of the actual hearing. However, on both occassions I did not feel there was sufficient opportunity to question the appellant - only the appellant's representatives.

10

Q1 All but one case followed the normal pattern. In one case the independent person used a very novel approach. He obtained from the advocate the views that witnesses were expected to provide - he then called in witnesses and questioned them himself.

11

Q1 Acted more as a chairman controlling proceedings.

Q2 Very much more firm with definite ideas about how the hearing should be conducted and the evidence to be examined.

12

Q1 No, previous experience was also good. Arbitration professional and constructive.

13

As above - same person answering questionnaire for different case.

ES1 Cases - Trade Union Responses to Q 7 [1,2,4 & 5] re General Experience

1

Q1 I have found dealing with a number of ACAS arbiters that most are fair minded and have a good knowledge of industrial relations. If they were not I would have raised this through ACAS.

Q2 Most arbiters have shown me courtesy and dealt with the appeal in a very professional way.

I have been an EETPU official for 10 years and have taken many appeals in that time to the arbiter within the Supply agreement and up to now have not had any complaint except sometimes I wait above 6 weeks for the report.

Q4 Sometimes I wait above 6 weeks for the report. [I don't know if that is the fault of the arbiter or when he refers the report to ACAS who then refer to the Electricity Council.]

2

Q1 The answers given in question 1 of Section A adequately summarises the role of the independent person in all cases in which I have been involved.

Q2 Generally speaking, I have had no complaints or misgivings about the independant person under the circumstances, However, I refer to my comments in question 8[1] and 10.

Q4 I have never had cause for complaint with regard to the reports in terms of punctuality and clarity.

Q5 Have had no problems.

3

Q1 I tend to feel that some assessors are allowing themselves to be unduly influenced by case law and philosophy of the Industrial Tribunals.

Q2 All of the assessors conducted the appeals in a fair and flexible manner.

Q4 The majority are clear and unambiguous.

Q5 No problems as far as I am aware.

4

Q1 More competent than some experienced.

Q2 Seemed familiar with inquiries.

Q4 Condoned Board's incompetence in case, no observations or criticisms.

Q5 To be expected.

5

Q1 Some have difficulty in appreciating the terms and conditions set out in the NJIC agreements. Some do a 'one man show' and ignore the assessors.

Q2 Generally speaking most conduct hearing in an informal and relaxed setting although one or two adopt a 'courtroom' approach.

Q4 No problem with the actual report although some appear to take a long time to prepare and publish.

6

Q1 Sections 1c-f found to be unsatisfactory.

Q2 Proficient in a, d, e, g

Q4 90 per cent acceptable.

Q5 Satisfactory.

7

Q2 The last case I had before Mr X for arbitration was my second heard by him and my experience in the first case gave me no confidence that I would succeed because I felt, and do still feel, that in the first case the Board's decision to dismiss should not have been upheld. I felt that Mr X really leaned towards the employer's view rather than look at the case on its merits. I feel that his view of arbitration on disciplinary matters is too near the Industrial Tribunal system of dispensing 'justice' and too legalistic in outlook.

Q4 It did not go into any detail as to how he had arrived at his decision.

Q5 Having had the dismissal upheld by Mr X it was no problem.

8

Q1 On one occasion he appeared not to understand the points raised.

Q4 Late and not enough detail "I find in favour of the company/union" is not enough.

9

Q1 I believe this "independent" acted too much like a judge/recorder.

Q2 Jocular - but with humour nobody understood!

10

Q4 Brief to the point.

Q5 As directed.

11

Q1 Was persuaded by one of the assessors [electrical] not to permit the precedent award in a similar case which went to Industrial Tribunal.

12

Q1 Permitted father of appellant to state a case on behalf of his son.

13
Q5 In the main I have been satisfied with this aspect on all counts in all cases.

14
Q4 The Award. Should give more information how arrived at decision

ES1 Cases - Management Responses to Q 8 [1] re Other Qualities

1 Must prepare themselves beforehand on the basic issues and arguments.

Should not allow broad generalities about what other employers have done in other circumstances, particularly as these assertions are heresay.

2 In relation to [h] above it is important that he/she concentrates on making a judgement, on the merits of the case, and does not try to satisfy both parties by arriving at a compromise decision.

An ability to distinguish, and to concentrate, on main points at issue.

3 Clarity, succinctness, control of hearing to evaluate main issues and avoiding sidetracking.

4 The experience of settling disputes by arbitration can be counter productive. This is not a process of arbitration. The object is to assess "was management's judgement fair and reasonable", it is not to get a solution acceptable to all sides.

5 Ability to be decisive, rather than to arbitrate.

6 As above

7 Ability to assess reasonableness of Board's decision not to substitute their own decision.

8 Acknowledging that for the appellant this is a "unique" occasion requiring sensitivity and a full explanation of how things will happen.

9 Experience of chairmanship.

10 Knowledge of ACAS Code of Practice and Employment Law. Wisdom.

11 A sense of realism in examining/suggesting reasonable penalties.

12 Complete objectivity and a moderate degree of skepticism.

13 Report of comment 5. As 5 above.

ES1 Cases - Trade Union Responses to Q8 [l] re Other Qualities

1 A reassurance that the independent person and the assessors have studied the documents before the hearing.

2 To convey to appellant that he has read the papers and has understood them.

3 To identify issues from reports submitted prior to hearing.

4 To be able to understand human relationships at all levels in industrial environments.

5 Able to communicate with all types and to demonstrate arguments understood.

6 Ability to communicate.

7 Ability to inspire confidence.

8 They should not have any case law on their minds when arbitrating. The influence of the Industrial Tribunals should not prevail in any way. They should not look at matters legalistically.

9 I feel that it is essential that the independent person should have in-depth knowledge of Industrial Law/Case Law.

ES1 Cases - Management Responses to Q 10

How satisfied are you with reference to an independent person as the final stage of the industry's disciplinary procedure?

I

1 Very Satisfied - The Board's case was conducted within the agreed guidelines of the industry's national agreements and ACAS code of conduct on disciplinary matters. As such it would not have proceeded to final stage unless the Board were confident of the upholding of the decisions taken by management at earlier stages.

2 Very Satisfied - The independence demonstrated and impartiality renders the ultimate verdict easier "to live with". It is also much preferable to the expenditure in terms of management time and money to going to tribunal and more often than not saves going to this stage since both parties feel they have been dealt with fairly.

3 Very Satisfied- Introduces the element of independent impartiality into what can often develop into complex disciplinary cases which are dealt with under the ESI Formal Procedures.

4 Very Satisfied - It is difficult to envisage a more suitable backstop. The independent person has no vested interest in the case and at least in theory should be acceptable to all concerned - albeit perhaps more acceptable to the victor.

II

1 Satisfied - But I am concerned that there are 4 stages of appeal [including Industrial Tribunal]. Management only have to fail once and there is no second chance. The system appears to be loaded in the employee's favour.

2 Satisfied - The process is a bit bureaucratic and there is perceived to be a tendency for the majority of staff to appeal automatically. The hearings themselves are a reasonably satisfactory way of reviewing decisions.

3 Satisfied - I think the key problem is a tendency to apply an 'arbitration' type style with results which favour the appellant by comparison to the employer's likely success at the Industrial Tribunal. If this became ever more prevalent the employer would ultimately abandon the system in favour of IT references.

4 Satisfied - I believe that the outcome is almost a lottery due to the influence of the personalities of the two advisers, and to the loose structure of the proceedings, ie one day you may be able to present your case well whereas another day there will be undue stress placed upon some emotional pleading and the result will go the other way.

Also there is nothing to prevent or discourage persons from going to appeal on the off chance of success even though they know that the original penalty was fair and reasonable.

5 Satisfied - From both my personal involvement and observation I regard the Independent stage an essential part of the process; to both sides it can be seen as a 'Tribunal in itself' indeed, in the two most recent cases heard in the Area for dismissal, both ex-employees proceeded no further with their unfair dismissal applications.

6 Satisfied - One comment I have about the independent person stage of the disciplinary procedure is that it is not necessarily the final stage. A person who is dismissed will still have recourse to an Industrial Tribunal.

Recently a tendency has been growing for people accused of misconduct to take the appeal through all its stages regardless of the strength of the case, on the basis that they have, in effect, nothing to lose. The procedure therefore begins to look as if it is loaded in the employee's favour and as a consequence dealing with disciplinary cases becomes very time consuming. It is worth noting that management have no right of appeal and can in effect lose the case at many of the stages of the procedure.

7 Satisfied - But it could be construed as being unfair to the employer inasmuch that he is bound by the independent person's decision in respect of a dismissal case, whereas the employee has the further right of taking his case to an Industrial Tribunal.

8 Satisfied - The initial appeal stage in the industry's procedures is to a higher management official. This individual is not usually viewed by the union as being impartial, eg they see him as a management man who is bound to be biased. The independent person is clearly seen to be independent as he is generally not known to both parties.

9 Satisfied - The reference to the independent person [following the initial appeal] provides, and is seen to provide, clear protection against unfair treatment. Most cases are resolved within the ESI agreements with little recourse to Industrial Tribunals. The problem is that the procedure is weighted in favour of the employee who can exercise his legal right to appeal to an Industrial Tribunal if the arbiter finds against him. The employer is bound totally by the arbiter's decision even if in law he could prove 'fair' treatment.

10 Satisfied - Based on my experience I am persuaded that the IPs who hear appeals are, for the most part, sufficiently detached, yet sympathetic, to reach judgments objectively.

11 Satisfied - Generally satisfied except in one case where the independent person had none of the qualities referred to above and reached a perverse decision. The independent person's involvement would be most valuable if it was recognised by Industrial Tribunals to a greater extent.

12 Satisfied - The independent person stage has the merits of being relatively informal, cheap and avoids legalism.

13 Satisfied - Please see answers to Question 7.

III

1 Not Satisfied - There is a tendency for many cases to go to ACAS even when there is clearly no hope of success. Whilst I fully support the need for fair treatment, I believe the independent person should have the right to nave a preliminary assessment on the merits of hearing a case. The current agreements in ESI means that the employer has to defend himself however frivolous the case. Where dismissal is concerned I believe the applicant should be required to sign a COT3 form to remove the case from IT jurisdiction.

I am happy with the theory of this final internal stage, but believe the practice has led frequently to abuse of the system by some representatives who are not prepared to tell members they will not support a case. This, of course, is a fault with our system and not the fault of the ACAS arbitrator.

2 Not Satisfied - In my experience independent persons either 'arbitrate' and choose a middle course, which is generally unhelpful, or they apply an award based on how they personally would have acted in a manager's situation. In my view, in determining whether the Board's actions are 'fair and reasonable' they should not apply more stringent criteria than that adopted by an Industrial Tribunal. That is, if the Board's action is within a range of reasonable responses of 'average' employers, it should be confirmed as applied.

3 Not satisfied - as above.

4 Not satisfied - The Independent Person hearing should be the final stage in the disciplinary procedure. However, more and more dismissed employees are taking their cases to Industrial Tribunals. Boards are bound by IP decisions - an employee is not. Either the IP should be able to award all of the penalties available to an Industrial Tribunal [this would enable Boards to obtain the appropriate exemption - ie no appeal to a Tribunal would be allowed] or the Independent Person appeal stage should be scrapped for dismissal cases. The costs to Boards of defending both IP and Industrial Tribunal cases are enormous.

5 Not Satisfied - The industry's disciplinary procedures are very exacting and prolonged. I feel that our system gives more than adequate protection to employees against unfair penalties and references to independent persons are not necessary.

IV

1 Not categorised - From my experience of these hearings arbitrators generally act fairly and impartially. I am however, concerned at the number of appeals going through and would quite like some form of pre-assessment process to limit the number going forward to a full hearing.

ACAS ARBITRATION SURVEY - QUESTIONNAIRE RESULTS

ES1 Cases - Trade Union Responses to Q 10

How satisfied are you with reference to an independent person as the final stage of the industry's disciplinary procedure?

I

1 Very Satisfied - The first stage of appeal is to a "higher management official" - I totally oppose this part of the procedure for obvious reasons. If the arbiter does his job as given in my answers I would be very satisfied with the outcome.

It is also my policy that if I lose the ACAS appeal, it is very unusual to then go to an Industrial Tribunal, which of course is my and the individual's right.

2 Very satisfied - Because my members are likely to get a better hearing than in an Industrial Tribunal which is a system which no TU official has any confidence in. Also any recommendation for reinstatement is mandatory.

3 Very Satisfied - Because the principal officers [union and Board] have a good working knowledge of the ESI disciplinary agreement. I am confident that a 'fresh - impartial' set of eyes and ears can readily see both sides of the argument and not be persuaded by the ramifications of making a fair decision/award.

4 Very Satisfied - On each occasion the independent person has appeared to be just that 'independent' and one felt that all aspects of the appeal were fully considered.

5 Very Satisfied - In my view it is the best system around - especially compared to [a] industry's internal appeal system and [b] Industrial Tribunal experience. [a] is not impartial and [b] is too legalistic.

6 Very satisfied - the independent person can/does apply a fresh set of ideas to the case without being bound by an employer's 'party line'.

7 Very Satisfied [no reasons given].

8 Very satisfied - Because its independent, therefore outside management influence and can be seen to be fair.

9 Very Satisfied - [1] non legalistic compared to Tribunal; [2] gives protection to employees with less than 2 years service.

II

1 Satisfied - I found that the independent person was very fair and he could see that there was a clash of personalities between myself and management. Also management brought forward information that was not in the written evidence that was submitted to the appeals board and the Chairman made comments on this after I protested. He stated that he would not let this colour his final award and this proved to be so.

2 Satisfied - As a final stage where reference to an Industrial Tribunal is not available it's a useful final step. The independent arbitrator is much more likely to give an individual the benefit of the doubt than a senior manager.

3 Satisfied - I have only in my experience in the industry had any doubts about one particular arbitrator and I have expressed them in this questionnaire.

4 Satisfied - The very fact that both sides can identify an independent and hopefully impartial individual makes the decision more acceptable, particularly to the unsuccessful party.

5 Satisfied - When internal procedures have been pursued and found not to resolve the issue then an independent third party becomes the only acceptable solution.

6 Satisfied - Having gone through numerous appeals I am satisfied that the independent person is not clouded in his judgement by management strategy in terms of commercial/contractual issues.

7 Satisfied - At least gives the employee the view that someone other than his employer is considering his position.

8 Satisfied - In spite of the member doing everything which could have "lost" his case the "independent" did decrease the penalty. I cannot complain about this!!

9 Satisfied - Very difficult to judge anyone after such limited experience to any independent body.

10 Satisfied - Provides for an independent and unbiased approach and decision.

11 Satisfied - If the 'independent person' was from the industry or the trades union he could not be seen to be impartial.

12 Satisfied - With the exceptions stated before.

13 Satisfied [No reason given].

III

1 Not Satisfied - In my experience the appeals to the independent body are dealt with purely on the facts of the case and on the procedure. Very little weight seems to be placed on any legal points raised. Since the outcome of such hearings could influence decisions at an Industrial Tribunal I have reservations as to the relevance of this stage in the procedure.

2 Not Satisfied - As a lay representative, and one who appreciates real justice, have two instances where justice was not carried out.

3 Not Satisfied - The truly impartial 'independent person' does not exist. In my experience they - in varying degrees - exhibit an inbuilt bias towards maintenance of the status quo.

ES1 Cases - Management Responses to Section E - Final Comments

1 A better briefing to ensure independent persons see their role to make a judgement on the case in question, not to try to split the difference. It would be interesting to know how many cases have resulted in the penalty being increased.

A widening of the source of recruitment to include experienced managers or trade union officials [not involved with the industry] might improve the service.

2 The independent person stage is useful to the extent that it provides an alternative to Industrial Tribunals with the benefit of an input from assessors familiar with the practices of the ESI. If Industrial Tribunals reach decisions that are inconsistent with those of independent persons, then the independent person stage is simply a waste of time for everybody - particularly for the employer who has no appeal beyond the independent person stage.

3 The number of cases handled by an independent person under the ESI disciplinary procedures is few. My own personal involvement as the Board's advocate has been limited to two cases [including the one the subject of this questionnaire]. Both have been handled in an exemplary manner by the independent person to the entire satisfaction of the Board.

4 Please see comments under 10. After careful consideration I believe that the independent person appeal is not appropriate to a privatised industry. Employment law imposes sufficiently high standard of reasonableness on the large employers to act fairly. There is no right of appeal for Boards against an independent person's decision, no matter how perverse that decision may appear. To a dismissed employee, it is simply an additional appeal before he exercises his statutory right to appeal to an Industrial Tribunal.

At the very least, the independent person appeal stage should only be applicable where an employee has no statutory rights [ie penalties less than dismissal or dismissal where employment is less than 2 years].

5 It would be helpful if there was a standard format for the conduct of the independent person stage rather than leaving this to the discretion of the chairman. In practice the chairman makes his own rules of procedure which makes it difficult when preparing submissions. For example, management do not know whether they will be required to present their case first or whether they will be required to respond to the case presented by the trade union side. Similarly, they do not know in advance whether they will have the opportunity to ask questions of the other side or whether all questions will have to be conducted through the chair.

6 I believe the system looks good superficially but the outcome is unsafe - it is too subject to the skill of the appellant's representative because he can introduce arguments not used at the original hearings and make sweeping statements about the harshness of the penalty compared with the monetary loss to the employer.

7 Main concern is as 10. I think terms of reference could include general statements that the principles of employment law would be applied.

8 Experience gleaned from colleagues suggest that the results can be unpredictable in that ACAS IPs do not always appear to be bound by accepted rules of procedure or standard tests of proof of guilt or innocence.

9 [i] Beyond the comments made above there should be the facility for the arbitrator to impose a penalty on the applicant in frivolous cases.

[ii] The arbitrator should receive a full statement from both sides [not just management] putting forward the basis of their case and should be able to have an initial assessment of the merits of the case.

[iii] No case should be heard that does not have the express support of the full-time union official and representation by that official [after all, the agreement was made between TUs and the management].

[iv] Where an applicant has the right to appeal to an Industrial Tribunal, ACAS should not arbitrate unless the applicant signs a COT3 binding the applicant to abide by the ACAS decision.

[v] All measures to speed up the process and reduce the frequency of patently unnecessary hearings should be taken.

[vi] The ability to review decisions should be introduced.

10 In terms of the final stage in the procedure it has been my experience that the impartiality of the ACAS independent persons has provided the essential platform for resolving disciplinary matters usually to the satisfaction of both parties.

ESI Cases - Trade Union Responses to Section E - Final Comments

1 I have left questions in Section A unanswered because, though the arbitrator appeared during the hearing to be perfectly fair and competent, what I can only describe as a totally illogicality was requested of the parties upon the hearing reconvening after he had heard all the representations. The arbitrator requested representatives of both parties to accompany him to see the appellant's GP to ascertain what was meant on a medical certificate by the words "get out and about". Both the employer representative and ourselves were agreed that this was totally irrelevant to the case and indicated that the arbitrator had completely "missed the point".

2 Independent persons give too much credence to Board's evidence. Tampering cases presumed so-called expert Board witnesses were infallible. Subsequently totally discredited.

When inquiry takes place a percentage indication of reversals of decisions would be informative, as Board not always right.

Sometimes a decision based on natural justice would be proof of effectiveness, not being allowed to hide behind NJTC constitution.

3 Such an internal appeal structure has avoided cases going to Industrial Tribunals and because of the 'binding' nature of the award I think all sides accept the value of the machinery - however the Boards, I know, are concerned that the appellant may still take his case [of dismissal] which then duplicates the final stage which is the subject of this document.

4 Its effectiveness can be improved by the speeding up of holding the appeal and by the sending of the report.

As indicated earlier, I have taken many appeals during the last 10 years and to give you some idea: within the NWEB there are some 3,900 NJIC employees and I represent 2,600 of them.

5 I think the system works quite well. In general the members have confidence in the impartiality of the arbitrators but I sense myself that a legalistic tendency seems to be appearing among some arbitrators who are influenced by Industrial Tribunal decisions in similar kinds of cases.

I have had a great deal of experience at a senior TU level in this industry and I make that comment with regret.

It may help if academics, who, during the course of their job are entangled in Industrial Tribunals, are not considered for appointment.

6 Having been to two appeals with an independent chairman I found that I had nothing but praise for this type of appeal that gave both sides a fair hearing and in my experience gave an award to fit the evidence as submitted.

7 Suggest that it is better for the issue to be resolved informally between the appellant and his representative and the management. Shop floor workers are not accustomed to court room scenarios, only have half an hour or so with their trade union official before the appeal. Management have all the time and resources in the world to prepare their case and are familiar with the system. The appellant is therefore at a considerable disadvantage.

8 Evidence given at hearings should be assessed as if in a court of law, and subjected to the same degree of examination you would expect there. It is too often the case that 'disciplinary notes' prepared and presented by management are given the status of an official record of the earlier

stages of the disciplinary process. In my opinion notes of previous hearings, should only be submitted if they have been agreed as a correct record by both parties.

9 Thought will need to be given as to how the NJIC agreement might change in respect of appeals following privatisation.

10 Better understanding of the terms and conditions laid down in the NJIC agreement.

11 I am not unhappy with the system.

12. Conclusion - system very good.

13 Assuming that the final stage of the procedure is designed to obviate the need to proceed to an Industrial Tribunal, then I believe that where legal points are raised, then expert legal opinion should be sought before decisions are made.

14 As I am a recently appointed officer and only had the one experience of the industry's procedure I don't feel in a position to suggest any changes.

Alice Brown
December 1989

APPENDIX IV

UNIVERSITY OF EDINBURGH CONFIDENTIAL

SURVEY OF ARBITRATION AND MEDIATION PROCEDURES

(A) GENERAL BACKGROUND

1. Age:

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2. Education:

(a) Where did you receive your secondary education?

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(b) At what age did you leave full-time education?

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(c) Did you receive post-school education, e.g. at College or University? Please specify.

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3. Qualifications:

(If your answer is 'Yes' to any of the following, please elaborate.)

Do you have:

(a) a degree from a University/College? Yes ☐ No ☐

.....

(b) legal qualifications? Yes ☐ No ☐

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(c) other professional qualifications? Yes ☐ No ☐

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(d) other educational or industrial qualifications? Yes ☐ No ☐

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4. Experience:

(If your answer is 'Yes' to any of the following, please elaborate.)

Do you have:

(a) industrial/commercial experience? Yes ☐ No ☐

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(b) management experience? Yes ☐ No ☐

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(c) experience as a trade union official? Yes ☐ No ☐

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(d) legal experience? Yes ☐ No ☐

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Have you:

(e) ever been employed by ACAS or the Department of Employment in a full-time capacity? Yes ☐ No ☐

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(f) been in HM Forces? Yes ☐ No ☐

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(g) had other relevant industrial experience, for example, consultancy work? Yes ☐ No ☐

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5. Occupation:

(a) Are you currently in employment or have you retired?

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(b) If you are in employment, please give a brief description of the post held.

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(c) What was your employment at time of becoming an ACAS Arbitrator?

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(d) Please list previous posts held.

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6. Recruitment:

How were you recruited as an Arbitrator for ACAS?

(a) Did ACAS approach you?

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(b) Did you contact ACAS with a view to offering your services?

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(c) Were you encouraged to approach ACAS by a third party?

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(d) If other than the above, please specify.

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(B) ARBITRATION

7. How long have you acted as an Arbitrator for ACAS?

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8. In addition to working for ACAS, have you acted as an Arbitrator for any of the following:

(a) CAC? Yes ☐ No ☐

(b) Institute of Arbitrators? Yes ☐ No ☐

(c) Privately? Yes ☐ No ☐

9. Single Arbitration:

(a) Approximately how many ACAS voluntary arbitration cases have you dealt with as a Single Arbitrator?

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(b) Have you been assisted by Assessors in any cases you have dealt with? Yes ☐ No ☐

If yes,

(c) what did you find to be the advantages of their service?

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(d) what did you find to be the disadvantages of their service?

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10. Board of Arbitration:

(a) Approximately how many ACAS voluntary Arbitration cases have you dealt with as Chairman of a Board of Arbitration?

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If none, please proceed to question 11.

(b) what did you find to be the advantages of having side members on the Board?

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(c) what did you find to be the disadvantages of having side members on the Board?

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11. Single or Board of Arbitration:

(a) Have you observed any distinction between the type of cases going to Single Arbitration and the type going to a Board? Yes ☐ No ☐

If yes, please specify

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(b) Should there be criteria for choosing Single Arbitration rather than a Board? Yes ☐ No ☐

Please explain your answer.

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12. Agreements:

(a) Have you ever been asked to interpret substantive agreements? Yes ☐ No ☐

(b) If yes, did you encounter any particular problems in interpretation? Please explain your answer.

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(c) In your experience, were the agreements themselves in need of revision?

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13. Written Statements of the Parties:

(a) Did you always receive written statements from both parties?

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(b) Did you find these to be satisfactory in most cases?

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(c) If not, did this inhibit the Arbitration and award making process?

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14. Terms of Reference:

(a) Are you satisfied with the quality of the terms of reference presented?

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(b) To what extent have you felt restricted by the terms of reference?

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(c) If you have felt restricted, how, if at all, did you overcome this?

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15. Award:

There is an implied criticism that Arbitrators always seek to 'split the difference':

(a) What is your understanding of the term 'split the difference'?

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(b) How often have you felt under pressure to 'split the difference' or reach some kind of compromise?

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(c) Do you prefer to make a straight choice in your judgement in favour of one side or the other?

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(d) Do you consider that there is wider scope for the use of straight choice/flip flop/pendulum Arbitration? If so, can you suggest areas where it would be appropriate?

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16. Reasons:

(a) What do you consider to be the advantages of giving Reasons for your Award?

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(b) What do you consider to be the disadvantages of giving Reasons for your Award?

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(c) Do you prefer the system of recording your 'Considerations' to giving Reasons for your Award?

If so, why?

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(d) Alternatively, do you prefer to make no comment and just give your Award?

If so, why?

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17. Recommendations:

(a) Do you consider it is part of the Arbitrator's duties to make recommendations? Yes ☐ No ☐

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(b) What do you consider to be the advantages of giving recommendations?

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(c) What do you consider to be the disadvantages of giving recommendations?

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18. Outcome:

(a) Would you like to be informed as to how your Award was received by the parties? Yes ☐ No ☐.

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(b) Have you any ideas on how this could best be done to ensure reliable feedback?

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(C) CURRENT ISSUES

19. Procedure Agreements:

(a) Have you dealt with cases where the parties' voluntary agreement has a clause which permits reference to Arbitration? Yes ☐ No ☐

(b) If yes, did you find the agreements appropriate to current circumstances?

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(c) What do you consider to be the advantages of writing-in Arbitration and/or the use of ACAS itself into Procedure Agreements?

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(d) What do you consider to be the disadvantages of writing-in Arbitration and/or the use of ACAS itself into Procedure Agreements?

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(e) Do you have views about the use of Arbitration in the public sector, and in particular 'essential services'? (for example, the use of standing bodies of Arbitration)

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20. Voluntary or Compulsory Arbitration:

(a) What are the advantages of voluntary Arbitration?

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(b) What are the disadvantages of voluntary Arbitration?

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(c) What are the advantages of compulsory Arbitration?

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(d) What are the disadvantages of compulsory Arbitration?

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(e) What do you consider to be the relative merits of joint and unilateral access to Arbitration?

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21. ACAS:

(a) Could ACAS do more than it presently does in the form of Bulletins, Induction Training and Seminars to enhance industrial relations Arbitration? Yes ☐ No ☐

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(b) If yes, can you suggest ways? (For example, would you favour obtaining professional qualifications or becoming a member of an Institute?)

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(c) Can the process be taken too far?

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22. Conciliation:

Are you satisfied with the current arrangements for preserving the integrity of Arbitration and the separate integrity of Conciliation? Please explain your answer. Yes ☐ No ☐

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23. General:

Please make any other general comments that you would wish to make on the present and/or future role of Arbitration and the Arbitrator. (For example, on the introduction of legally binding arrangements for Awards.)

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(D) MEDIATION

24. Have you ever acted as a Mediator? Yes ☐ No ☐

If yes, please complete the following:

25. Approximately how many cases have you conducted?

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26. Which particular issues, if any, do you consider are better dealt with by Mediation rather than by Arbitration?

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27. Are you satisfied with the distinctions between Mediation and Arbitration which are currently in practice?

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28. Are there any special methods you introduce to Mediation which you do not use for Arbitration?

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THANK YOU FOR YOUR HELP.

MAY, 1984

APPENDIX V

SINGLE ARBITRATION CONFIDENTIAL

EDINBURGH UNIVERSITY SURVEY OF ACAS ARBITRATION

A. RECENT EXPERIENCE OF ARBITRATION

First I would like to ask you about your most recent experience of ACAS Arbitration.

In the following questions please tick the appropriate boxes.

1. How did this particular dispute come to be referred to ACAS arbitration?

   (a) Union request ☐

   (b) Employer request ☐

   (c) Joint union and employer request ☐

   (d) ACAS suggestion ☐

   (e) Other (please specify) ☐

   .....

2. Which of the following was the main subject of the dispute? (tick one only)

   (a) General pay and conditions claim ☐

   (b) Grading ☐

   (c) Other pay matters and conditions of employment not part of a general pay claim (eg questions over hours, holiday entitlement, shift or overtime premium payments, equal pay, bonus payments, piece work rates, sick pay, etc) ☐

   Please specify.....

   (d) Trade union recognition ☐

   (e) Changes in working practices ☐

   (f) Other trade union matters (eg disclosure of information for collective bargaining purposes, time off for trade union duties, etc) ☐

   Please specify.....

   (g) Redundancy ☐

   (h) Dismissal/discipline ☐

   (i) Other issues (please specify) ☐

   .....

3. **Which types of occupation were directly involved in the dispute? (tick all that apply)**

(a) Managerial/administrative ☐

(b) Scientific/Professional ☐

(c) Clerical ☐

(d) Supervisory ☐

(e) Skilled workers ☐

(f) Semi-skilled workers ☐

(g) Unskilled workers ☐

(h) Others (please specify) ☐

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4. **How many employees were directly involved in the dispute?**

(a)	Under 20	☐	(e)	200-499	☐
(b)	21-49	☐	(f)	500-999	☐
(c)	50-99	☐	(g)	1000 +	☐
(d)	100-199	[ ]			

5. **Did the dispute involve any industrial action?**

(a) Yes, strike action was taken ☐

(b) Yes, but only action short of a strike was taken ☐

(c) No, but industrial action was threatened ☐

(d) No action was threatened or taken ☐

6. **If <u>strike</u> action was taken, when was it taken? (tick all that apply)**

(a) Before the agreement to refer the dispute to arbitration ☐

(b) Between then and the arbitration hearing itself ☐

(c) Between the hearing and the issue of the award by the Arbitrator ☐

(d) After the award was issued ☐

7. Do you have a procedure agreement for dealing with this type of dispute

YES ☐ NO ☐

If Yes

(a) Is ACAS conciliation explicitly required or permitted by the procedure agreement?

Required ☐ Permitted ☐ Not mentioned ☐

(b) Is ACAS arbitration explicitly required or permitted by the procedure agreement?

(i) Required ☐

(ii) Permitted, at the request of one party only ☐

(iii) Permitted by agreement between the parties ☐

(iv) Not mentioned. ☐

(c) If ACAS arbitration is required or permitted by the procedure agreement, does the agreement place specific restrictions on the arbitrator?

(i) Yes, the arbitrator can only decide either for the employer's or for the union's final position (pendulum arbitration) ☐

(ii) Yes, there are other restrictions on the arbitrator's decision ☐

(iii) No, the arbitrator is free to award as he/she thinks appropriate ☐

8. Was there a conciliation meeting under ACAS auspices before the reference was made to arbitration?

YES ☐ NO ☐

If Yes,

Did the conciliator

		YES	NO	DON'T KNOW
(a)	Explain the various methods available (eg single arbitrator, Board of Arbitration, Central Arbitration Committee (CAC))?	☐	☐	☐
(b)	Adequately explain the arbitration procedure (eg written submissions, oral hearing, written award)?	☐	☐	☐
(c)	Explain the binding nature of arbitration?	☐	☐	☐
(d)	Assist with the wording of the terms of reference?	☐	☐	☐

9. The following questions concern the attitude of the parties towards arbitration and the issues in dispute.

		YES	NO	DON'T KNOW
(a)	Both parties were keen to use arbitration	☐	☐	☐
(b)	The relationship between the two parties was very hostile	☐	☐	☐
(c)	The differences separating the parties were very large	☐	☐	☐
(d)	There were important matters of principle at stake in this dispute	☐	☐	☐

10. How was the method of arbitration decided?

(a) It was agreed at conciliation ☐

(b) It was agreed between the parties before ACAS involvement ☐

(c) It was laid down in the procedure ☐

(d) Other (please specify) ☐

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11. Were there agreed terms of reference?

YES ☐ NO ☐

12. Did the terms of reference

(a) require the arbitrator to choose the employer's or the union's final position? ☐

(b) restrict the arbitrator's award in other ways? ☐

(c) leave the arbitrator free to award as he/she thought appropriate? ☐

13. Did the terms of reference cover all the issues which needed to be settled by the reference to arbitration?

YES ☐ NO ☐

14. Where did the arbitration hearing take place?

(a) On ACAS premises ☐

(b) On employer's premises ☐

(c) On Trade Union premises ☐

(d) Other (please specify) ☐

....

15. Did the arbitrator make a site visit as part of the reference?

YES ☐ NO ☐

16. The following questions concern the organisation of the arbitration.

	YES	NO	DON'T KNOW
(a) The other party's written submission was received in time to study it before the hearing	☐	☐	☐
(b) The hearing was arranged promptly.	☐	☐	☐
(c) The practical arrangements for the hearing were satisfactory.	☐	☐	☐
(d) The award was issued promptly	☐	☐	☐

17. Who chose the arbitrator?

(a) The parties ☐

(b) ACAS, after consulting the parties ☐

(c) ACAS ☐

18. The following questions concern the role of the arbitrator in the arbitration proceedings.

The arbitrator:

	AGREE	PARTLY AGREE	DISAGREE
(a) Made clear his/her role in the dispute?	☐	☐	☐
(b) Allowed you sufficient time to state your case	☐	☐	☐
(c) Allowed you sufficient opportunity to question the other party?	☐	☐	☐
(d) Addressed questions to both parties?	☐	☐	☐
(e) Conducted the hearing to your satisfaction?	☐	☐	☐

If DISAGREE to (e), please explain

.....

19. The following questions concern the characteristics of the arbitrator in the proceedings.

The arbitrator:

		AGREE	PARTLY AGREE	DISAGREE
(a)	Acted impartially	☐	☐	☐
(b)	Handled matters confidently	☐	☐	☐
(c)	Had your trust	☐	☐	☐
(d)	Had sufficient experience/ knowledge about industrial relations	☐	☐	☐
(e)	Sufficiently understood the issues involved	☐	☐	☐
(f)	Acted in a courteous and friendly manner	☐	☐	☐
(g)	Acted according to your expectations	☐	☐	☐

If DISAGREE to (g), please explain

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. .....

.. ..

20. **What was the outcome of the arbitration?**

(a) The arbitrator found for the employer's position ☐

(b) The arbitrator found for the union's position ☐

(c) It was a compromise award. ☐

21. The following questions concern the arbitrator's report.

	YES	NO	DON'T KNOW
(a) It was clear and to the point	☐	☐	☐
(b) It adequately summarised each party's case	☐	☐	☐
(c) It stayed within the terms of reference laid down	☐	☐	☐
(d) It gave some indication of how the arbitrator reached his/her award	☐	☐	☐
(e) The award was unambiguous.	☐	☐	☐
(f) The award was fair	☐	☐	☐

22. How would you describe the contribution of the award to the settlement of the issues in dispute?

(i) So far, since the award was issued

Excellent	Very Good	Good	Moderate	Poor
☐	☐	☐	☐	☐

(ii) In the longer term

Excellent	Very Good	Good	Moderate	Poor
☐	☐	☐	☐	☐

If the answer to (i) or (ii) is Moderate or Poor, why was this?

(a) The terms of reference asked the arbitrator the wrong question. ☐

(b) The award was deficient. ☐

(c) There was another reason. ☐

If (b) or (c) please explain.

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23. Would you use ACAS arbitration again if a similar dispute arose arose in the future?

YES ☐ NO ☐

If NO, please explain

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B. GENERAL VIEW OF ARBITRATION

Now I would like to ask you about your general view of ACAS arbitration and the role of arbitrators.

24 Please indicate if you agree or disagree with the following statements.

	AGREE	DISAGREE	DON'T KNOW
(a) Management representatives are generally reluctant to put a dispute to arbitration	☐	☐	☐
(b) Union representatives are generally reluctant to put a dispute to arbitration	☐	☐	☐
(c) The stronger party in a dispute will not usually want to go to arbitration.	☐	☐	☐
(d) An organisation which agrees to arbitration improves its public image.	☐	☐	☐
(e) Arbitration should not take place until all agreed procedures for negotiation have been exhausted, or a deadlock in the negotiation reached.	☐	☐	☐
(f) Arbitration should not take place until an attempt has been made to resolve a dispute through conciliation.	☐	☐	☐
(g) Arbitration should not take place while industrial action is occurring	☐	☐	☐
(h) Arbitration should be written into procedure agreements:			
(i) As a final voluntary stage	☐	☐	☐
(ii) As a final stage either party can invoke.	☐	☐	☐
(iii) As an automatic final stage.	☐	☐	☐
(i) A disadvantage of arbitration is that parties sometimes become addicted to its use.	☐	☐	☐
(j) Arbitration is a valuable way of resolving some disputes.	☐	☐	☐
(k) Without ACAS arbitration the number of stoppages in industry would increase.	☐	☐	☐

25. The arbitrator should

	AGREE	DISAGREE	DON'T KNOW
(a) See his/her primary job as settling the dispute	☐	☐	☐
(b) Not have any recent direct association with management:	☐	☐	☐
(c) Not have any recent direct association with a union	☐	☐	☐
(d) In disputes over pay, take into account:			
(i) ability to pay	☐	☐	☐
(ii) comparability	☐	☐	☐
(iii) the rate of inflation	☐	☐	☐
(iv) the general public interest	☐	☐	☐
(e) Give an indication of how he/she arrived at the award.	☐	☐	☐
(f) Make recommendations to one or both sides if he/she sees other problems between the parties not covered by the terms of reference.	☐	☐	☐

26. In your view, which of the following qualities are important for effective arbitration?

	ESSENTIAL	IMPORTANT	NOT IMPORTANT
(a) Impartiality	☐	☐	☐
(b) Industrial or commercial experience	☐	☐	☐
(c) Knowledge of industrial relations and collective bargaining	☐	☐	☐
(d) Knowledge of the particular industry involved in the dispute.	☐	☐	☐
(e) Independence	☐	☐	☐
(f) Authority	☐	☐	☐
(g) A sense of humour	☐	☐	☐
(h) Experience in settling disputes by arbitration	☐	☐	☐
(i) An ability to understand complex problems quickly	☐	☐	☐
(j) Originality of ideas	☐	☐	☐
(k) Determination	☐	☐	☐

(l) Other qualities (please specify)

.....

.....

C. BACKGROUND INFORMATION

To help us analyse the information you provide, can you tell us:

27. Are you - a union representative? ☐ (please go to Q28)
- a management representative? ☐ (please go to Q29)

28. If you are a union representative

(a) what is the name of your trade union?.....
.....

(b) what proportion of the workforce does your union have in membership in the establishment(s) covered by this particular arbitration?

(i) Under 10% ☐
(ii) 10-24% ☐
(iii) 25-49% ☐
(iv) 50-74% ☐
(v) 75-100% ☐

(Please go to Q30)

29. If you are a management representative

(a) In which industry is your main business?
.....

.....

(b) Is your organisation a member of an employers federation?
YES ☐ NO ☐ DON'T KNOW ☐

(c) How many people work in the establishment(s) covered by this particular arbitration?

(i) Under 20 ☐
(ii) 21-49 ☐
(iii) 50-99 ☐
(iv) 100-199 ☐
(v) 200-499 ☐
(vi) 500-999 ☐
(vii) 1000 + ☐

(d) Is your organisation
Single plant? ☐ Multi-plant? ☐

(e) Which trade unions, if any, do you recognise in the establishment(s) covered by this particular arbitration?
.....
.....

(f) What proportion of employees in that establishment(s) are union members?
(i) Under 10% ☐
(ii) 10-24% ☐
(iii) 25-49% ☐
(iv) 50-74% ☐
(v) 75-100% ☐

30. Before this dispute have you personally been involved in any other dispute which went to ACAS arbitration?

YES ☐ NO ☐

If YES

When was the last such time?

Before 1980	☐	1982	☐	1985	☐	1988	☐
1980	☐	1983	☐	1986	☐	DON'T KNOW	☐
1981	☐	1984	☐	1987	☐		

D. FINAL COMMENTS

Please use the space below to make any comments you wish about your personal opinions of, or experience with, ACAS arbitration. In particular, do you have any suggestions for possible improvements in its effectiveness?

Thank you very much for your help in completing this questionnaire

APPENDIX VI

TRADE UNION KEY

AACBRRD	Amalgamated Association of Card Blowing and Ring Room Operatives
AADCST	Amalgamated Association of Operative Cotton Spinners and Twiners
AASA	Automobile Association Staff Association
ABS	Association of Broadcasting and Allied Staff
ACT	Association of Cine Technicians
ACTAT	Association of Cinematograph, Television and Allied Technicians
ACTSS	Association of Clerical, Technical and Supervisory Staffs
ACTT	Association of Cinematograph, Television and Allied Technicians
AEU	Amalgamated Engineering Union
AHP	Association of Head Postmasters
AMKIU	Amalgamated Moulders and Kindred Industries Union
APDE	Association of Post Office Executives
APEX	Association of Professional, Executive, Clerical and Computer Staff
ASBSBSW	Amalgamated Society of Boilermakers, Shipwrights, Blacksmiths and Structural Workers
ASLEF	Associated Society of Locomotive Engineers and Firemen
ASSET	Association of Supervisory Staffs, Executives and Technicians
ASTMS	Association of Scientific, Technical and Managerial Staffs
ASW	Amalgamated Society of Woodworkers
ASW	Association of Scientific Workers
ASWCM	Amalgamated Society of Wood-Cutting Machinists
ASWDKT	Amalgamated Society of Wire Drawers and Kindred Trades

ASWDKW	Association of Shop Workers, Distributive and Kindred Workers
ASWM	Amalgamated Society of Woodcutting Machinists
AUBTWGBI	Amalgamated Union of Building Trade Workers of Great Britain and Ireland
AUEFW	Amalgamated Union of Engineering and Foundry Workers
AUEW	Amalgamated Union of Engineering Workers
BAEA	British Actors Equity Association
BAEA	British Aerospace Employees Association
BALPA	British Airline Pilots Association
BESO	Bank of England Staff Organisation
BFAWU	Bakers, Food and Allied Workers Union
BFWA	British Funeral Workers Association
BMA	British Medical Association
BMISSBS	Boiler Makers, Iron and Steel Ship Builders Society
BRTTT	British Roll Turners Trade Society
CAWU	Clerical and Administrative Workers Union
CBSSA	Cheshire Building Society Staff Association
CEU	Constructional Engineering Union
CFGB	Coopers Federation of Great Britain
CIASSC	Central Institutions Academic Staffs Salaries Committee
CSSSC/IOAO/LEA	Committee on Salary Scales and Service Conditions of Inspectors, Organisers and Advisory Officers of Local Education Authorities
DATA	Draughtsmen's and Allied Technicians' Association
EETPU	Electrical, Electronic, Telecommunications and Plumbing Union
EPEA	Electrical Power Engineers Association

ETA	Entertainment Trades Alliance
ETU	Electrical Trades Union
FCDPA	Federal Council of Departmental Police Associations
FSCNC/ITL	Factory Supervisors Central Negotiating Committee of Imperial Tobacco Limited
FTATU	Furniture, Timber and Allied Trade Union
GMBATU	General Municipal, Boilermakers and Allied Trade Union
GMWU	General and Municipal Workers' Union
GSSNSO/NJC/ CAT	Ground Services Staff National Sectional Panel of the National Joint Council for Civil Air Transport
HCWU	Hotel and Catering Workers Union
HDEU	Heating and Domestic Engineers' Union
IBOA	Irish Banks Officials Association
IPCS	Institution of Professional Civil Servants
ISTC	Iron and Steel Trades Confederation
JIC/FCI	Joint Industrial Council of the Floorcovering Contracting Industry
JIC/FSQI	Joint Industrial Council for the Freestone and Sandstone Quarrying Industry
JIC/NFI	Joint Industrial Council for the Narrow Fabrics Industry
LCB/TT	London Conciliation Board for the Tailoring Trade
MAPA	Merchant Navy and Airline Officers' Association
MATSA	Managerial, Administrative, Technical and Supervisory Association
MDFA	Master Dyers' and Finishers' Association
MHDFA	Master Hosiery Dyers' and Finishers' Association
NACSS	National Association of Clerical and Supervisory Staffs
NALGO	National and Local Government Officers' Association

NAPLO	National Association of Power Loom Overlookers
NATKE	National Association of Theatrical and Kine Employees
NATSOPA	National Society of Operative Printers, Graphical and Media Personnel
NATTKE	National Association of Theatrical, Television and Kine Employees
NEONSP/NJC/ CAT	Navigating and Engineer Officers' National Sectional Panel of the National Joint Council for Civil Air Transport
NFBTO	National Federation of Building Trades Operatives
NGA	National Graphical Association
NJC for LAFB	National Joint Committee for Local Authorities' Fire Brigades
NJC/PI	National Joint Council for the Pottery Industry
NJC/PTI	National Joint Council for the Port Transport Industry
NJIC/GI	National Joint Industrial Council for the Gas Industry
NJIC/PTI	National Joint Industrial Council for the Passenger Transport Industry
NJICESI	National Joint Industrial Council of the Electricity Supply Industry
NLB	National League of the Blind
NLHM	National Association of Licensed House Managers
NSBMM	National Society of Brass and Metal Mechanics
NUAW	National Union of Agricultural Workers
NUBOMCWKT	National Union of Blastfurnacemen, Ore Miners, Coke Worker and Kindred Trades
NUDAGMW	National Union of Domestic Appliance and General Metal Workers
NUDBTW	National Union of Dyers, Bleachers and Textile Workers
NUEFMEW	National Union of Enginemen, Firemen, Mechanics and Electrical Workers
NUFLAT	National Union of Footwear, Leather and Allied Trades
NUG	National Union if Glovers

NUGMW	National Union of General and Municipal Workers
NUHKW	National Union of Hosiery and Knitwear Workers
NUMIM	National Union of Musical Instrument Makers
NUPCMBMSMW	National Union of Packing Case Makers, Box Makers, Sawyers and Mill Workers
NUPE	National Union of Public Employees
NUS	National Union of Seamen
NUSMW	National Union of Sheet Metal Workers
NUSMWB	National Union of Sheet Metal Workers and Braziers
NUSMWCHDE	National Union of Sheet Metal Workers, Coppersmiths, Heating and Domestic Engineers
NUTGW	National Union of Tailors and Garment Workers
NUVB	National Union of Vehicle Builders
NWMPCBMGWS	North Western and Midland Packing Case, Box Makers and General Woodworkers Society
PTU	Plumbing Trades Union
RBSATEA	Retail Book, Stationery and Allied Trades Employees Association
RLPPA	Rugby League Professional Players Association
SAIMA	Shipbuilding and Allied Industries Management Association
SATA	Supervisory, Administrative and Technical Association
SDTU	Sign and Display Trade Union
SHMA	Scottish Horse and Motormen's Association
SLADE	Society of Lithographic Artists, Designers, Engravers and Process Workers
SNJC for TSSC	Scottish Joint Negotiating Committee for Teaching Staff in School Education
SOGAT	Society of Graphical and Allied Trades
SPS	Sawmakers Protection Society

STC	Steel Trades Confederation
STSCC	Scottish Teachers' Service Conditions Committee
STUWU	Scottish Transport and General Workers Union
SUBAW	Scottish Union of Bakers and Allied Workers
SWMAESTA	South Wales and Monmouthshire Allied Engineering Skilled Trade Association
TGWU	Transport and General Workers Union
UBSSO	Union of Boot, Shoe and Slipper Operatives
UCATT	Union of Construction, Allied Trades and Technicians
UKAEAWC	United Kingdom Atomic Energy Authority Whitley Council
UPA	United Patternmakers Association
URTU	United Road Transport Union
USBISS	United Society of Boilermakers and Iron and Steel Shipbuilders
USDAW	Union of Shop, Distributive and Allied Workers
WLBTU	Watermen, Lightermen, Tugmen and Bargemen's Union